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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

FREDERICK W. ELLIS, APPELLANT,
v.
THE INTERSTATE COMMERCE COMMISSION. } No. 712.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Interstate Commerce Commission, on its own motion and under orders made by it, instituted an investigation, based upon complaints filed by shippers, concerning the allowances paid by carriers subject to the act to regulate commerce for the use of private cars, the practices governing the handling and icing of same, and their failure to furnish adequate service, to determine whether such allowances and practices were unjust, unreasonable, or unduly discriminatory, or otherwise in violation of the act.

All common carriers subject to the act, including Armour Car Lines and other carriers engaged in transportation as defined by the act, were made parties and duly served.

Upon hearing under these orders F. W. Ellis, vice president of Armour Car Lines, who had been duly served with subpœna, appeared but refused to answer twenty-eight questions propounded by the Commission and to produce documents demanded. Thereupon this proceeding was brought, under section 12 of the act, in the District Court of the United States for the Northern District of Illinois, to compel answers to the questions and the production of the documents. The case is here upon Ellis's appeal from the decree of the District Court requiring him to answer the questions and produce the documents.

The questions, numbered for convenient reference, appear in the appendix, pages 50–54, and may be grouped into six general classes, as follows:

1. Concerning interlocking officers and intercorporate relations between Armour Car Lines, Armour & Company, and Fowler Packing Company. (Questions numbered 1, 2, 3, 7.)

2. Concerning the acquirement by the Armour Car Lines, upon its organization, of cars previously owned by Armour & Company and Armour Packing Company. (Questions numbered 4, 5, 6.)

3. Concerning contracts of Armour Car Lines with Armour & Company and Colorado Packing Company for furnishing cars and icing service. (Questions numbered 8, 9, 12, 13.)

4. Concerning the ownership, manufacture, repair, and handling of cars, tending to show

Armour Car Lines engaged in transportation as defined by the act. (Questions numbered 10, 11, 14, 16, 17, 19.)

5. Concerning the production of statements showing profit and loss, credits and debits to income, etc., received from so much of the business of Armour Car Lines as related to transportation as defined by the act. (Questions numbered 15, 20, 21, 25, 26, 27, 28.)

6. Concerning Armour Car Lines investment in and character of ownership of icing plants and information from which the reasonableness of icing charges might be determined. (Questions numbered 22, 23, 24.)

ARGUMENT.

The Government maintains:

1. That Armour Car Lines is a common carrier engaged in transportation within the meaning of the act to regulate commerce and, therefore, the Commission has authority to inquire into the management of its business.

2. That the questions propounded related to matters under investigation, which the Commission was legally entitled to investigate, and, therefore, the witness, who offered no legal personal excuse for not answering, was properly required to furnish the information sought.

87439—15—2

I.

THE ARMOUR CAR LINES IS A COMMON CARRIER WITHIN THE MEANING OF THE ACT TO REGULATE COMMERCE.

Section 12 of the act provides:

> That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act. (Act of Feb. 4, 1887, c. 104, 24 Stat. 379, 383.)

If Armour Car Lines is a common carrier subject to the act, there can be no question as to the propriety of requiring appellant to answer the questions propounded. (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25.) This is admitted.

> Within that field of inquiry (that is, into the business of common carriers subject to the act) Congress undoubtedly intended to confer upon the Commission comprehensive powers. It could act upon complaint or on its own motion, and in either case it could push its investigation to any extent that might be necessary to elicit the material facts and could invoke the aid of the Federal courts in so doing. (Appellant's brief, pp. 20, 21.)

We may proceed, then, to determine what is a common carrier subject to the act.

ARMOUR CAR LINES WITHIN THE LETTER OF THE ACT.

Section 1, as amended by the Hepburn Act, provides:

> That the provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * *. and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; * * *. (Act of June 29, 1906, c. 3591, 34 Stat. 584.)

The common law meaning of common carrier has been well defined by this Court, as follows:

> A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. (*Propeller Niagara* v. *Cordes*, 21 How. 7, 22.)

This is practically the same as Bouvier's definition, quoted by appellant (Brief, p. 22), which is as follows:

> A common carrier is one whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him.

A consideration of the statute as a whole will demonstrate that the expression "common carrier" is not therein used in its technical sense.

For example, it will be observed that, as defined above and in many other authorities, the expression "common carrier" at the common law did not include carriers of persons.

> The term common carrier did not at the common law embrace a carrier of passengers. (*Central of Georgia Railroad* v. *Lippman*, 110 Ga. 665, 672, 50 L. R. A. 673; *Boyce* v. *Anderson*, 2 Pet. 149, 155; *Chicago, Rock Island & Pacific Ry.* v. *Zernecke*, 183 U. S. 582; *Elder Dempster Shipping Co.* v. *Pouppirt*, 125 Fed. 732; *Hollister* v. *Nowlen*, 19 Wendell 234, 236.)

Appellant's insistence that only common law "common carriers" were embraced in the act, would exclude from subjection to its provisions carriers engaged exclusively in the transportation of passengers. We know that this was not intended by Congress. If it be answered that such exclusion does not result because of the addition of the words "of passengers" in the clause, "The provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation *of passengers* or property, etc.," we reply that, just as as the words "of passengers" broaden the definition of "common carrier," just so the addition, to the content of the term "transportation," of the words "all services in connection with * * * ventilation, refrigeration or icing," extends the meaning of

"common carrier" to include those performing such services.

By statute, therefore, Congress has, as far as this act and the questions in this case are concerned, extended the common law definition of the term to make it read as follows:

> A common carrier is one who undertakes for hire to transport, from place to place, passengers or goods, or to furnish cars, refrigeration, etc., for such goods, of those who may choose to employ him.

As thus defined, the Armour Car Lines is clearly a common carrier subject to the provisions of the act, since admittedly it was engaged in furnishing such service. (*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 362, 363; *Atchison, T. & S. Ry.* v. *United States*, 232 U. S. 199.)

The fact that Armour Car Lines does not hold itself out as ready and willing to furnish its cars and service generally to shippers, but deals with the public principally through the railroads, is immaterial. This Court has so held in adopting the following words of Mr. Justice Van Devanter, speaking, while a Circuit Judge, for the Court of Appeals for the Eighth Circuit, in the case of *Union Stock Yards Co.* v. *United States*, 169 Fed. 404, 406:

> And it is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct,

> and actually does conduct, for hire a part of the transportation of every live-stock shipment which they accept for carriage to or from that point, including such shipments as are interstate. (*United States* v. *Union Stock Yard*, 226 U. S. 286, 305.)

It appears, therefore, that Armour Car Lines comes within the letter of the act, since it was not only engaged in "transportation" as defined by the act, but practically its entire business consisted of such service.

Appellant quotes *Gracie* v. *Palmer*, 8 Wheat. 605, to show that Armour Car Lines does not fall within the definition of common carrier. It is interesting to note that this case was decided in 1823, years before railroads were thought of and some sixty-four years before the Interstate Commerce Commission was created. It dealt with primitive conditions and common law as distinguished from statutory common carriers. As has been seen, the meaning of the term "common carrier" has been extended by the act to regulate commerce, and this case, therefore, is beside the mark.

The quotation (Appellant's Brief, p. 30) from *Consolidated Forwarding Co.* v. *Southern Pac.*, 9 I. C. C. 206, decided in 1902, before the passage of the Hepburn Act, was a dictum in a dissenting opinion on a point which the majority of the Commission expressly left open.

The cases of *Pullman Co.* v. *Linke*, 203 Fed. 1017, and *Lemon* v. *Pullman Palace Car Co.*, 52 Fed. 262, are cited in support of the contention that sleeping-

car companies were not common carriers until made so by the act. This Court has apparently not passed upon the question, but has, in an analogous case, held that express companies are common carriers. (*Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 177.)

In the other cases relied upon, the decisions merely held that carriers like omnibus lines, *Parmelee Transfer Co.*, 12 I. C. C. 40, truckmen engaged in hauling goods from docks to stores, *Hirsch* v. *New England Navigation Co.*, 113 N. Y. Supp. 395, street-car lines, *Omaha Street Ry. Co.* v. *Interstate Comm. Comn.*, 230 U. S. 324, were not carriers by railroad and therefore not common carriers subject to the act. With these we have no quarrel.

The remaining cases discussed, except those cited and relied upon by the Government, involve constructions of other parts of the act than those pertinent to the issues in this case and are therefore not in point.

ARMOUR CAR LINES WITHIN THE SPIRIT OF THE ACT.

It is proper to examine the legislative history of the act "for the purpose of ascertaining the situation which prompted this legislation" and the evils sought to be remedied. (*Tap Line Cases*, 234 U. S., 1, 27.)

This history is not brief. For years prior to the passage of the amendment, known as the Hepburn Act (June 29, 1906, c. 3591, 34 Stat., p. 584), which is the only part of the statute we are now considering, the evils arising from the private car system

had been pointed out in President's messages and reports to and debates in Congress, as well as by writers on economic subjects.

The Interstate Commerce Commission, in its annual report of 1905, submitted to the Congress that passed the Hepburn Act, said:

> As the business is now conducted, some railroad companies furnish refrigeration themselves, but in most cases it is furnished by independent companies which usually provide the car, for which the railway pays, and the ice, for which a charge is made against the shipper. Formerly there were several of these companies, but to-day the business has fallen into the hands of two or three, of which the Armour Car Lines is the principal. Extended investigations by the Commission have led to the conclusion that the charges imposed are, in some cases at least, exorbitant, and that those charges are not uniformly exacted.
>
> * * * * *
>
> In view of the great importance of these charges to the shipper, *we suggest that the Congress ought to make that service, by express provision in the law, a part of the transportation itself.* We do not at this time recommend that carriers should be prohibited from using private cars or from employing the owners of such cars to perform the icing service if they find that course to their advantage, but we do recommend that these charges should be put on the same basis as all other freight charges. They should be published and maintained the same as the transportation *charge, and be subject to the same supervision and control.* (p. 7.)

The President, in his annual message to the same Congress, urged that the Commission be given supervision over these carriers.

> All private car lines, industrial roads, refrigerator charges, and the like *should be expressly put under the supervision of the Interstate Commerce Commission* or some similar body so far as rates, and agreements affecting rates, are concerned. The private car owners and the owners of industrial railroads are entitled to a fair and reasonable compensation on their investment, but neither private cars nor industrial railroads nor spur tracks should be utilized as devices for securing preferential rates. A rebate in icing charges, or in mileage, or in a division of the rate for refrigerating charges is just as pernicious as a rebate in any other way. (Fifth Annual Message to the Senate and House of Representatives, December 5, 1905. Messages and Papers of the Presidents, vol. 2 of Supplement, pp. 1157, 1162.)

In response to the message of the President and the report of the Interstate Commerce Commission, Congress immediately began the consideration of means to remedy the evils mentioned.

The bill as reported to the House by the Committee on Interstate and Foreign Commerce contained the provision now under consideration. This provision was not amended in any manner during the long debates in the House and Senate, and appears in the approved act in the exact words in which it was reported by the committee. Whatever, there-

fore, was said with reference thereto related to its present phraseology.

In the debates many Congressmen, including two of the members of the committee who framed the bill, Townsend and Bartlett, construed this provision, as the Government now does, to place private car lines under the operation of the act and supervision of the Interstate Commerce Commission. Excerpts from their speeches follow:

> This bill will place the *private car lines under the supervision and regulation of the Interstate Commerce Commission, just as it does the railroads upon which they are operated. This power is included in the bill by the definition which is given to the term "transportation,"* that word being so defined as to include these agencies engaged in interstate commerce. * * * (Congressman Bartlett, Vol. 40, Cong. Rec., Part 2, p. 1843.)
>
> * * * * *
>
> Some of the most serious complaints have been those against these special services. Private car companies have been organized to do the people's work; the railroads have loaned their tracks to these companies, and while they have presented the charge to the shipper these private companies have really imposed them, *and it is claimed that they were outside the jurisdiction of the Interstate Commerce Commission.* It is not necessary for me to detail to the House or the country the gross injustice which has been done the people through these instrumentalities. *We believe*

the bill effects a complete remedy for these evils. (Congressman Townsend, 40 Cong. Rec., Part 2, p. 1765.)

The private car system, including all refrigerating and icing privileges, *is also placed under the supervision of the Interstate Commerce Commission.* (Congressman Lewis, of Georgia, 40 Cong. Rec., Part 3, p. 2153.)

I would support it did it embrace only putting the single provision of *private cars, the icing of cars, terminal and switch facilities under the jurisdiction of the railroad commission.* [Applause.] (Congressman Clayton, vol. 40, Cong. Rec., part 2, p. 1996.)

The second evil which I will notice—and it is akin to the one which I have just discussed—is that of private car lines, a subject that has been so much in the public eye for the past several years, so thoroughly discussed in all the prints of the country, and so thoroughly ventilated in the hearings before the House and Senate Committees on Interstate and Foreign Commerce that I deem it unnecessary to do more than mention it in passing. Everyone knows how they grew up and the history of their development, and everyone equally knows how their pernicious practices have outraged not only the shippers, but the carriers themselves. *They deny that under the present law they are subject to the jurisdiction of the Commission and can be regulated by it, and it is apparent that something should be done, and that vigorously and effectually, to prevent their further encroachments.*

* * * * *

> To my mind *this effectually includes the private car lines, switch tracks, and terminals, affords a fair guaranty for their supervision and proper regulation*, and, in a great measure, if not entirely, provides for existing evils so far as they are concerned. It strikes a blow at rebating in that it *puts their charges under the supervision of the Commission, provides for publicity, and gives that body an opportunity to correct any inequalities and improper practices.* (Congressman Bowers, 40 Cong. Rec., Part 3, pp. 2159–2160.)

In the Senate we find similar views expressed. Senator Tillman, in reporting the bill to the Senate, said:

> The bill as it is presented to the Senate is the bill that was reported to the House by its Committee on Interstate Commerce and passed by that body without amendment, and it is generally supposed to embody the well-digested views of the Executive and those leaders of his party whose advice he consents to take. There are in it some essential changes of the original interstate-commerce law—the act of 1887. *These are designed to place under the jurisdiction of the Commission all switches, terminal facilities, private car lines, elevators, and any and all other facilities for transportation* or shipment or storing merchandise, in order to prevent the public carriers from utilizing such instrumentalities for purposes of discrimination or extortion. These amendments to the old law by those who have examined the question closely have been thought

> necessary to secure the best possible regulation of interstate commerce in a manner to prevent injustice and wrong to shippers. (40 Cong. Rec., pt. 4, p. 3835.)

Senator Knox, as will be seen from the excerpts from his speech, quoted infra, was of the same opinion.

From the above we see how emphatic were the expressions of those who had given careful attention to the bill that its passage would effectually place concerns like Armour Car Lines under the supervision and control of the Commission.

Appellant relies on two quotations from speeches by Senator Dolliver to prove that this act did not cover these companies. The second of the quotations is from a speech made on an amendment offered by Senator Foraker to take out of the definition of transportation the words "ventilation, refrigeration or icing." The amendment was offered on the supposition that the bill was designed to prevent altogether the use of private cars or to require the railroad companies to own them. Both of Senator Dolliver's speeches were devoted to showing that this view of Senator Foraker was unfounded, and that the bill, instead of abolishing the private car lines, merely regulated them. Senator Dolliver's speeches, therefore, as will be seen from a careful reading, did not construe the act to exclude private car lines from regulation by the Interstate Commerce Commission but only expressed the view that it would not compel the railroads to own such cars.

The following words show that he clearly recognized the necessity of such regulation.

> So flagrant have these abuses grown that even our greatest railways have not been able to protect themselves, much less their patrons, against these extortions and wrongs. (Senator Dolliver, 40 Cong. Rec., part 7, p. 3193.)

Appellant also relies upon a speech by Senator Clapp opposing the Kittredge amendment, quoted on page 27 of appellant's brief, which expressly provided that private car lines should be deemed carriers subject to the act. In this speech Senator Clapp was chiefly interested in pointing out the desirability of having the railroad primarily responsible for furnishing refrigerator cars and icing facilities so that the shipper would have to deal with only one party. He was not concerned with protecting private car lines from supervision of the commission, but was earnestly opposing a measure he thought would require shippers to deal with two carriers. His attitude was, it is submitted, that, even if both private car lines and the railroads were carriers, still the railroad should be responsible directly to the shipper, just as the initial carrier is made liable for losses occurring on connecting lines.

Furthermore, the Kittredge amendment was not voted down by the Senate, as might be inferred from appellant's brief, because of opposition to putting these car lines under the control of the Commission. On the contrary, the amendment was apparently voted down because it was thought unnecessary.

While it was under consideration several Senators asked what was the scope of the bill as it stood. Senator Knox, who closed the debate, clearly stated that the bill already placed private car lines under the control of the Commission.

> Mr. KNOX. If the Senator from South Carolina will permit me just a moment, I think he has properly construed this bill. When you come to look at the proposed amendment (Kittredge) it only has one purpose, and that is to declare, as will be seen if the amendment be examined carefully on the fifth line, that the persons owning or leasing or managing cars shall be deemed carriers. For what purpose? The next line answers that question. They are to be deemed carriers "within the meaning of this act." Why are they to be deemed carriers "within the meaning of this act?" *To give the Interstate Commerce Commission jurisdiction over them. If you will take the bill as the Senator from South Carolina called attention to it a moment ago, you will find that under the definition of transportation that is all provided for.* Assuming that they are not carriers and assuming that they are not now within the jurisdiction of the interstate-commerce act, what are they? They are facilities and instrumentalities of commerce. That is what they are as a fact, and that, of course, no one can question. They are facilities and instrumentalities of commerce—they are cars. The pending bill says that all instrumentalities and all facilities of every kind used or necessary in the transportation of persons or property shall be within the meaning of this act, and then, in

order "to make assurance doubly sure," they bring it in under the title of "transportation," and say that "transportation shall include cars and other vehicles." *I therefore think it is wholly unnecessary* to adopt the amendment of the Senator from South Dakota.

Mr. CULLOM. May I ask the Senator a question?

The VICE PRESIDENT. The Senator from Massachusetts has the floor. Does he yield to the Senator from Illinois?

Mr. LODGE. I believe I have the floor; but I yield to the Senator.

Mr. CULLOM. I did not know the Senator from Massachusetts had the floor. The question I want to ask is, whether, *in view of the provision on the second page of the bill, the amendment of the Senator from South Dakota is necessary at all?*

Mr. KNOX. *In my judgment, it is wholly unnecessary.*

Mr. CULLOM. That is what I thought.

Mr. LODGE. Mr. President, I have received the answer I desired to receive—that the amendment is unnecessary.

The VICE PRESIDENT. The question is on agreeing to the amendment of the Senator from South Dakota [Mr. Kittredge].

The amendment was rejected.

(Vol. 40, Cong. Rec., pt. 7, p. 6440.)

The construction placed upon this act by the various Members of Congress, as shown from the above-quoted excerpts from their speeches, is in entire harmony with the construction placed upon it by this and other courts. (*United States* v. *Union Stock Yard*, 226 U. S. 286; *Southern Pacific*

Terminal Co. v. *Interstate Comm. Comn.*, 219 U. S. 498; *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007; *Interstate Comm. Comn.* v. *Reichmann*, 145 Fed. 235; *Atchison, T. & S. Ry. Co.* v. *United States*, 232 U. S. 199; *Pennsylvania Co.* v. *United States*, 236 U. S. 351.)

This is the construction placed on the act by Judson. "The act has been amended, see section 1, *supra*, in accordance with recommendations of the Commission, so that the private cars by whomsoever owned, used in transportation and refrigeration, and all the facilities of transportation used in interstate commerce, are under the control and regulation of the Commission. While the owner of the private cars is thus under the control of the Commission, the carrier is none the less responsible for all the necessary incidents of transportation and is bound to furnish them to all without discrimination and without undue preference." Judson, Interstate Commerce, § 253.

It is submitted that it is also the construction placed upon the act by the Armour Car Lines, since, as the record shows (pp. 118, 119), its employees, in the performance of their duties, accepted and used passes issued by the railroads with which it was under contract to furnish cars and refrigeration. If Armour Car Lines is not a common carrier, it has no right to accept such passes from the railroads. By their acceptance it represents itself to be a common carrier subject to the act.

It is further submitted that this is the reasonable construction to place upon the statute. Congress was not, in its endeavor to correct great abuses,

seeking a nice definition of the term "common carrier," but was exerting itself to provide, and by this act did provide, an effective means for regulating private car lines and preventing discriminations and unreasonable rates.

The common carrier may be a single legal entity or consist of two or more of such entities. In other words, the duties of the common carrier as defined by statute may be divided among several, each performing only a part of the functions of the common carrier. In such case all of the elements constitute the common carrier and the regulation of any single one is just as important and permissible as the regulation of the other elements. If, as in this case, the railroad performs only a part of the work and another corporation supplements it so that the acts of both are necessary fully to perform the duties of the carrier, the two constitute the legal common carrier and each is such carrier in the eyes of the law.

This record demonstrates that Armour Car Lines is performing just such supplementary services. Its business consists entirely of undertakings peculiarly within the functions of a common carrier as defined by the Act, as appears from appellant's reply to the question: "I will ask the witness if owning, manufacturing, rebuilding, repairing, renting and leasing of cars, and furnishing ice and refrigeration service is all of the business in which Armour Car Lines are engaged?" Appellant answered, "Yes, practically so. There might be something else that I have overlooked but I think not." (Record p. 112.) In his brief appellant further says, on page 4, "It (Armour

Car Lines) derives no revenue from the cars or from their use beyond the rentals paid by railroads and shippers."

Armour Car Lines has dedicated its property and devoted its entire business to the transportation of goods by railroad. Its business, therefore, is just as much affected with a public interest as is that of a railroad, and its proper conduct and regulation is equally as vital to the public welfare. It has just the same powers, within the sphere of its activities, to throttle business by its extortionate charges or to discriminate among shippers, as have the railroads. By its exclusive contracts, forbidding a railroad to purchase the service of any other car line, it becomes the exclusive agency of transportation of all goods requiring refrigeration. If it fails the railroad, transportation of this character can not be furnished the shipper. If its charges are extortionate the shipper, through the railroad, must pay.

If the private car line is not a common carrier subject to the control of the Commission but is permitted to lease cars and to furnish refrigeration to railroad and to private shippers at whatever prices it deems proper, as it is now doing, then it rests completely within its unregulated power on the one hand to force shippers to pay whatever it may choose to charge and on the other to grant rebates and favors to any shippers who may lay claim to its favor, whether because of intercorporate relationship or of mere caprice.

This could not have been the purpose of Congress in framing this great remedial statute. It was in-

tended, we submit, to correct great evils, everywhere recognized and affecting the welfare of the whole country.

> That the act to regulate commerce was intended to afford an effective means of redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. (*Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 439.)

This Court has not given the statute a technical construction, but has time and again brushed aside devices invented to subvert its purposes and consistently enforced the spirit of the law.

> We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress. (*Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 213.)
>
> To this extent and for these purposes [to secure equality of rates and to destroy favoritism] the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. (*New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391.)
>
> Our duty, however, is not to destroy the law but to enforce it, and in doing so to seek to discover the intention of the lawmaker, the wrong intended to be prevented and the rem-

> edy designed to be afforded by the enactment of the statute. (*United States* v. *B. & O. R. R. Co.*, 225 U. S. 306, 324.)

If all of the storm of public opinion, urgent messages of the President and reports of the Commission, strong statements of Senators and Congressmen, did not result in putting these private car lines under the control of the Commission and in affording it adequate means of ascertaining the reasonableness of their charges, but, on the contrary, left the private car lines, who had monopolized the business, free to charge the railroads, and thereby most certainly, though indirectly, the shippers, exorbitant prices for their services, then surely Congress has unintentionally given us the mere shell instead of the substance of a remedy.

> And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined by the substance of things and not by names, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such purposes. (*United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 326.)

All the evils sought to be remedied and the dangers to be avoided, are present in the management of a business like that of Armour Car Lines. It is engaged in "transportation" as defined by the act. The act is remedial and should be given a liberal construction. It is submitted, therefore, that the Armour Car Lines comes clearly within the spirit of the act.

II.

ANSWERS TO QUESTIONS COMPELLABLE EVEN THOUGH ARMOUR CAR LINES NOT COMMON CARRIER SUBJECT TO PROVISIONS OF THE ACT.

It is clear, under the decisions of this court, that answers to the questions propounded by the Interstate Commerce Commission and the production of the documents demanded by it, are compellable, whether Armour Car Lines be a common carrier subject to the act or not, (1) if the evidence sought relates to the matter under investigation, (2) if such matter is one which the Commission is legally entitled to investigate, and (3) if the witness is not excused on some personal ground.

> As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon any one, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the the Commission requires at his hands. These

> propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 476.)

This phase of the case, therefore, will be discussed under these three heads, though in slightly different order.

COMMISSION LEGALLY ENTITLED TO INVESTIGATE MATTERS IN QUESTION.

The power of Congress over interstate commerce is absolute and its control may be exercised through the Interstate Commerce Commission. (*Interstate Comm. Comn.* v. *Brimson*, 154 U. S., 447, 473, 474; *Interstate Comm. Comn.* v. *Goodrich Transit Co.*, 224 U. S., 194, 214.)

The powers of the Commission pertaining to this inquiry are granted in the following language:

Section 12 of the act, as amended March 3, 1889, and February 10, 1891, provides:

> * * *; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; * * * and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. (C. 128, 26 Stat., 743.)

In section 13 of the act it is provided:

> * * * the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this act, or concerning which any question may arise under any of the provisions of this act, or relating to the enforcement of any of the provisions of this act. And the said Commission shall have the same power and authority to proceed with an inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money. (Amended June 18, 1910, c. 309, 36 Stat., 539, 550.)

Section 15 of the act provides:

> That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act

for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. * * *

* * * If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reason-

> able, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (Amended June 18, 1910, c. 309, 36 Stat., 539, 551.)

It was under the authority of and in performance of the duties imposed by these sections and the Elkins Act (Feb. 19, 1903, c. 708, 32 Stat., 847, amended June 29, 1906, c. 3591, 34 Stat., 584, 587) that the Commission, upon its own motion, was proceeding when the present controversy arose.

The several orders made by the Commission during the progress of the investigation, which indicated the various lines of inquiry to be pursued, are included in and made part of the last order, so that it alone need be quoted. It is as follows (Rec., pp. 7, 8):

> No. 4906.
>
> IN THE MATTER OF PRIVATE CARS.
>
> SECOND SUPPLEMENTAL ORDER.
>
> It appearing that on the 5th day of June, 1912, an order in the above-entitled investigation was entered, reading as follows:
>
> "It appearing from complaint now on file with the Commission that the allowances paid by carriers subject to the act to regulate commerce for the use of private cars,

the practices governing the handling and icing of such cars, and the minimum carload weights applicable to the commodities shipped therein, are unjust, unreasonable, unduly discriminatory and otherwise in violation of the act to regulate commerce and the acts amendatory thereof or supplementary thereto;

"*It is ordered*, That a proceeding of inquiry and investigation be, and it is hereby, instituted by this Commission on its own motion into and concerning the practices of all carriers by railroad subject to the act to determine whether such allowances, practices, or minimum carload weights are unjust, unreasonable, or unduly discriminatory or otherwise in violation of said act with a view to the issuance of such order or orders as may be necessary to correct discriminations and to make applicable reasonable weights.

"*It is further ordered*, That all carriers by railroad subject to said act be made parties respondent to this proceeding, and that copies of this and any subsequent order entered herein be served upon said respondents."

It further appearing that on the 8th day of October, 1912, a supplemental order in the above-entitled case was entered, reading as follows:

"It appearing that there is much complaint from growers of fruits and vegetables and dealers in fish shipping these articles from points on the line of the Atlantic Coast Line Railroad Company in North Carolina to points north and east, on its own line and connections, such as Washington, D. C., Baltimore,

Md., Philadelphia, Harrisburg, and Pittsburgh, Pa., New York, Albany, and Buffalo, N. Y., Providence, R. I., and Boston, Mass., that the said carriers constantly fail to furnish an adequate and prompt supply of refrigerator cars suitable for the transportation in question, and likewise fail to perform said transportation with reasonable expedition, by reason of which inadequacies in equipment and service the shippers of these commodities as aforesaid are subjected to substantial and irreparable damage;

"*It is ordered*, That a hearing or hearings be had with respect to the above-stated matters, in connection with the general investigation now under way before the Commission in the proceeding entitled 'In the Matter of Private Cars,' at such times and places as the Commission may hereafter designate."

And it further appearing that certain individuals, firms, companies, and corporations owning or operating cars and other vehicles and instrumentalities and facilities of shipment or carriage of property in interstate commerce are necessary parties to this proceeding;

It is ordered, That all individuals, firms, companies, and corporations owning or operating cars and other vehicles and instrumentalities and facilities of shipment or carriage of property in interstate commerce be, and they hereby are, made parties respondent to this proceeding.

By the Commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

It appears from these orders that the questions under investigation were, as far as pertinent in this case, whether allowances paid for the use of private cars and the practices governing the handling and icing of same were unjust, unreasonable, unduly discriminatory, or otherwise in violation of the act, and whether there were inadequacies in such equipment and service.

An inquiry into these matters was clearly authorized, for the statute provides that "The Commission is hereby authorized and required to execute and enforce the provisions of this act," and these provisions expressly declare that no unreasonable or discriminatory rates or practices shall be permitted nor rebates given or received; that adequate facilities, including refrigeration and icing, shall be furnished; that reasonable compensation shall be paid to those furnishing same; and that the charge and allowance to the owner of property, transported under the act for any service directly or indirectly rendered in connection therewith or for any instrumentality used therein, shall be no more than is just and reasonable. (Secs. 1, 2, 3, and 15 of act to regulate commerce and Elkins Act, *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.* 230 U. S. 247.)

It is submitted, therefore, that every matter which the Commission undertook to investigate in this proceeding was one which it was legally entitled to investigate, since the act, in substantially the same words used in the orders, authorized and made it the duty of the Commission to do exactly what it

was undertaking in this investigation. Here, it will be noted, we are concerned with investigation not regulation.

> It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in theiraccounts, *is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants.* The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. *Further, the requiring of information concerning a business is not regulation of that business.* (*Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211.)

THE EVIDENCE SOUGHT RELATED TO MATTERS UNDER INVESTIGATION.

We pass to the consideration of whether the evidence sought was relevant to the issues made by the provisions of the Commission's orders.

This requires an adjustment of the evidence expected to the Commission's statement of the questions to be determined.

Anything, therefore, which related to or might throw light upon these issues was relevant in the strictest sense, although the Commission is not bound

in its investigations by the technical rules of pleadings and evidence.

> The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof. (*Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, 44.)

The issues made by the Commission's orders have been stated. An examination of the questions which appellant refused to answer discloses their relevancy. They related to the business and relations of two corporations, Armour Car Lines and Armour & Company, both of which were parties to the proceeding and had appeared pursuant to service upon them. We are not concerned with the substance of the anticipated answers, but may assume for the purposes of determining their relevancy that if the questions had been answered the information expected by the interrogator would have been adduced.

> Relevancy does not depend upon the conclusiveness of the testimony offered but upon its legitimate tendency to establish a controverted fact. (*Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, 44.)

We may further assume that the answers expected would have been in harmony with the facts as previously disclosed in the record and with the information on the subject which the Commission already possessed. An acquaintance with these facts will also throw light upon the materiality and relevancy of the questions asked.

The following facts had been developed during the hearing. It was the practice of private car lines to make exclusive contracts with railroads whereby the latter contracted to use none but the cars of the former (Rec., p. 78); that in addition to furnishing the cars, they also furnished refrigeration and icing for them under contracts with railroads, and in some instances with favored shippers; that usually these favored shippers were related in interest to the private car lines (Rec., p. 93); that Armour Car Lines had so contracted with Armour & Company (Rec., p. 108); that the car lines determined for themselves the amount of ice and salt put in bunkers of refrigerator cars and the shippers had to rely upon them "absolutely for all information respecting the actual furnishing of ice" (Rec., p. 40); that local conditions had a great deal to do with cost of materials and value of services (Rec., p. 75); that there were many complaints that the private car lines "do not treat all those cars alike" (Rec., p. 42); and that favored shippers, usually allied companies, were given the best equipment and icing service (Rec., p. 78).

It also appears from the eighteenth annual report of the Interstate Commerce Commission to Congress,

1904, that the Commission was aware that "the stockholders of Armour & Company own the stock of the Armour Car Lines" (p. 15), and that "at the present day all the above car companies (Fruit Growers Express, The Kansas City Fruit Express, Continental Fruit Express, and the Armour Refrigerator Line), have been absorbed by the Armour Car Lines Company, which has to-day, in our opinion, a practical monopoly of the movement of fruit in large quantities in most sections of this country." (Idem, p. 14.)

With these facts in mind the Commission was investigating, as expressly stated in the orders, whether the allowances paid to private car lines and the practices governing the handling and icing of cars were unjust, unreasonable, discriminatory, or otherwise in violation of the act and whether the service furnished was adequate.

It is evident that if the railroads pay exorbitant allowances to private car lines for rental of cars, it would be in violation of the act, because it expressly provides that only just and reasonable compensation may be paid and because unfair allowances would result in unjust and unreasonable rates to shippers and high prices to consumers.

> Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of the shippers and carriers. (*Atchison, T. & S. F. Railway Co.* v. *United States*, 232 U. S. 199, 217.)

Practices governing the handling and icing of cars would be unjust and unreasonable if they resulted in the shipper paying too much for the services rendered; they would be discriminatory if they resulted in giving to certain shippers lower rates or better service and equipment than to other shippers.

This principle has been announced by this court in cases involving the distribution of coal cars. (*B. & O. R. R. Co.* v. *Pitcairn*, 215 U. S. 481; *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452.)

Whatever, therefore, related to any of these inquiries was relevant to the issues as outlined in the orders of the Commission.

Armour Car Lines had icing plants in various parts of the country. Local conditions determine the cost of refrigeration and icing of cars. It was, therefore, proper and necessary, in order to determine whether the allowances paid the Armour Car Lines were just and reasonable, for the Commission to make detailed investigation concerning local conditions and costs of service and materials at the various points. (*Minnesota Rate Cases*, 230 U. S., 352, 434; *Smyth* v. *Ames*, 169 U. S., 466, 546.) It was also proper and relevant to inquire in to the income, profits, etc., derived from the business of Armour Car Lines, since its business was devoted to, and practically its entire income derived from, services in connection with transportation as defined by the act, furnished either to the railroads or shippers.

Questions relating to these matters grouped under classes five and six, page 3, are therefore relevant.

Appellant's contention to the contrary amounts to this, that the Commission, although the act expressly gives it the power and imposes upon it the duty to see that only just and reasonable allowances are paid for such service, is precluded, in an investigation to determine what is a reasonable allowance, from obtaining such evidence by compulsion from any individual or corporation except the railroad company. In other words, the railroad may appear and testify that it paid, to a company having a monopoly of the business, a certain price for the services rendered, that this was the lowest price it could obtain, and that it had no knowledge of the actual value or cost of the service. Thereupon, any witness, having knowledge of such value and cost, might refuse to testify, whether he be the person furnishing the service or not, thereby making it impossible for the Commission to determine what is a reasonable charge for the service.

We are only here concerned with the question of relevancy. The question of privilege is discussed below.

Questions grouped under classes one, two, and three, page 2, are relevant to the inquiry as to whether practices governing the handling and icing of cars are unjust, unreasonable, unduly discriminatory, and otherwise in violation of the act to regulate commerce and "the acts amendatory thereof or supple-

mentary thereto." This issue presents two phases, discrimination in service and discrimination in rates.

Discrimination in service may result from any device by which some shippers receive better equipment or better service than others. Certain shippers claim that their competitors, who were fortunate enough to lease cars direct from the private car line companies, secured prompter service and better cars than they did (Rec., pp. 78, 79); that only old equipment was furnished them, and as a consequence their products never reached the market in as good condition as their competitors (Rec., p. 79); and that discrimination was also shown to the same favored shippers in the refrigeration and icing of cars. Some of these complaints were against Armour Car Lines (Rec., pp. 79, 80).

Questions grouped under classes one, two, and three were asked for the purpose of ascertaining whether or not such discriminatory treatment was being afforded Armour & Company.

Armour Car Lines, under contracts, which it refused to disclose, furnished cars to Armour & Company, and possibly to a few favored shippers, perhaps allied with it.

> We (Armour Car Lines) are only under contracts to furnish Armour & Company cars, but we do furnish them to some of the other packers there, but not in large quantity. (Rec., p. 93.)

It is readily seen that, if Armour & Company secured these cars, and presumably the best of them,

at a price less than the railroads paid Armour Car Lines and less than the charge for similar cars and services other shippers had to pay, Armour & Company by such device would receive such discriminatory service as would amount to a rebate. Appellant complains that the word "rebate" is not mentioned in the order of the Commission under which the investigation was proceeding. This was entirely unnecessary, though it is alleged in the petition in this suit, because the word actually used in the orders "discrimination" includes rebate, which is merely an aggravated form of discrimination, and the order expressly recites that the inquiry extends to discriminations under the act to regulate commerce, and also all "acts amendatory thereof and supplementary thereto," which, of course, includes the Elkins Act dealing specifically with rebates.

The same form of discrimination might result also in a violation of section 15 of the Act, which provides that no charge or allowance shall be permitted the owner of property transported under the act, directly or indirectly, for any service rendered in connection with such transportation or for any instrumentality used therein, which is not just and reasonable.

It was very important, therefore, for the record to show the exact relationship existing between the two Armour companies and the terms of their contracts with respect to cars furnished thereunder and the refrigeration and icing of same.

If the Commission is precluded from investigating the character of the relations and contracts between

a shipper and a subsidiary company organized for the very purpose of securing discriminatory service and rates, there is no reason why by this simple device discriminatory service and rates may not be granted to such favored shipper as freely as they were before the passage of the act forbidding same.

This court has held that this may not be done by a subsidiary company organized by the railroad. The same principle would forbid such evasion by the shipper. (*Interstate Commerce Commission* v. *Baird*, 194 U. S., 25; *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447; *Armour Packing Company* v. *United States*, 209 U. S., 56; *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S., 286, 309; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S., 498.)

Any evidence, therefore, which would tend to show that the Armour Car Lines was merely a device used by Armour & Company, a great shipper of meat products using refrigerator cars, of which it was formerly the owner, to cover discriminatory treatment in matters of transportation, is highly material and relevant under the very words of the orders under which this investigation was proceeding.

The remaining questions which were asked and which appellant refused to answer are included in group four. They are relevant, as tending to show that Armour Car Lines business was exclusively that of one engaged in transportation as defined by the act, and to disclose the relations existing between it and the railroads with respect thereto.

APPELLANT NOT EXEMPT FROM ANSWERING QUESTIONS PROPOUNDED.

We have seen above that the questions asked appellant related to matters under investigation which the Commission was legally entitled to investigate. He was, therefore, properly required to answer the questions propounded and produce the documents demanded, unless he could establish a privilege personal to himself.

The duty of the citizen to testify is well expressed in the following quotation:

> For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule. (3 Wigmore on Evidence, sec. 2192.)

Appellant's refusal to answer the questions asked was not based upon any personal privilege. The objection offered was "That the question relates to the private business and affairs of Armour Car Lines; that, neither under the act of Congress nor under the orders which have been entered in this proceeding, has this Commission any jurisdiction, right, or authority to inquire into such matters or to demand the information which the question calls for." (Rec., p. 90.)

In the brief appellant claims no other privilege than that of privacy. "Our contention is that under the law and the Constitution the Commission has no jurisdiction or authority whatever to invade the private affairs of a corporation which is not a common carrier by railroad engaged in transportation within the meaning of the interstate commerce act." (Appellant's brief, p. 112.)

The part of the objection relating to the Commission's authority to investigate the matters in controversy has been discussed, and it remains, therefore, only to consider whether the objection "That the question relates to the private business and affairs of Armour Car Lines," is well founded in fact or law.

Inquiry into the matters covered by the questions asked would not constitute an invasion of the right of privacy, even if Armour Car Lines were entitled, as it is not, to claim such privilege.

These questions sought, as those in Groups 1 and 2, information which is either freely given to the public or recorded in official records; or as those in Groups 3 and 4, facts of vital importance to the public as affecting interstate commerce; or as those in Groups 5 and 6, facts which are annually given to the Government officials in the form of income-tax returns, not only by Armour Car Lines and Armour & Co., but by every other corporation earning more than a certain income. Indeed Armour Car Lines had itself furnished precisely this information for

three years of its business. Why was such information concerning other years so private?

Testimony relating to such facts, given in a formal proceeding before the Interstate Commerce Commission, after hearing before and judgment of a District Court requiring same, presents scarcely a suggestion of violation of the right of privacy, or of unreasonable search or seizure.

Furthermore, on account of the nature of the business transacted by Armour Car Lines, it can not properly be considered private, nor an inquiry into same a violation of the right of privacy. Undoubtedly, and admittedly, if the business transacted by Armour Car Lines had been performed by a railroad company, every part to the minutest detail might be investigated by the Commission. Does the mere fact that such business is transacted by one corporation rather than another affect its nature? If compulsory testimony in the one instance is not a violation of the right of privacy, why should it be in the other? The matters in question involve a great public interest—transportation in interstate commerce—over which Congress's power is absolute. Armour Car Lines business consists entirely of "transportation," as defined by the act to regulate commerce. Its business is affected with a public use, since its agencies are carried on in a manner to make them of public consequence. Therefore, having devoted its property to a use in which the public has an interest, it in effect has granted to the public an interest in that use and must submit to public

control for the common good to the extent of such interest. With respect to such business it has no more right to privacy than railroads engaged in the same or similar undertakings.

It is submitted, therefore, that appellant has not shown, as a matter of fact, that the investigation in question would violate the privilege of privacy, even if Armour Car Lines might claim same.

But, be this as it may, no corporation, whether public service or private, has any privilege of privacy which would justify a refusal to answer the questions and produce the documents demanded in this proceeding.

> But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Con-

gress. (*Wilson* v. *United States*, 221 U. S., 361, 382. See also *Wheeler* v. *United States*, 226 U. S., 478; *Grant* v. *United States*, 227 U. S., 74, 79; *B. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S., 612, 622; *Brown* v. *Walker*, 161 U. S., 591.)

Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. * * *

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only reserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had

been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. * * *

* * * Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over State corporations. (*Hale* v. *Henkel*, 201 U. S. 43, 74, 75.)

In *Hale* v. *Henkel*, 201 U. S. 43, 75, while general visitatorial power over State corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by the act of Congress. (*Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 215.)

Appellant quoted at length from several decisions to show that the District Court erred in requiring the questions to be answered.

In considering these decisions it should be kept in mind that this case is not an attempt by the Commission to regulate private car lines, as suggested by appellant, but to secure information essential to the regulation of dealings between them and the railroads; it is not a general inquisitorial investigation solely to get information of the private affairs of a citizen, but an investigation of certain affairs of a corporation based upon complaints of specific violations of the act; it is not an attempt of a special examiner under section 20 of the act to gain access to the correspondence of a railroad, but a demand that a witness, present in response to subpœna, answer certain questions, asked in an investigation conducted before the Commission in the manner of judicial investigations.

With the question in issue clear, the cases cited by appellant are obviously not in point.

In the *Employers' Liability Cases*, 207 U. S. 463, and in *Hopkins* v. *United States*, 171 U. S. 578, the sole question before the court was whether Congress could regulate an intrastate matter. These cases do not concern the right of Congress to authorize an investigation into matters connected with interstate transportation.

The *Pacific Railway Comn. case*, 32 Fed. 241, is overruled by *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The case of *Harriman* v. *Interstate Commerce Commission* involved solely the right of the Commission to institute a general investigation for the purpose

of recommending legislation. The Court expressly confined its decision to this ground. Mr. Justice Holmes says:

> Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have bearing upon any part of what it has in mind. (*Harriman* v. *Interstate Comm. Comn.*, 211 U. S. 407, 417.)

The case of *Kilbourn* v. *Thompson*, 103 U. S. 168, has no resemblance to the present case. There the question involved was the constitutional power of the House of Representatives to force a witness to testify concerning matters beyond the jurisdiction of the House.

The extent of the holding of the Court in the case of *Boyd* v. *United States*, 116 U. S. 616, was "that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property, is within the scope of the Fourth Amendment of the Constitution, in all cases in which

a search and seizure would be," as stated in *Hale* v. *Henkel*, 201 U. S. 43, 71.

The case of *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, decided at this term, involved only the construction of the words "accounts, records, and memoranda," found in section 20 of the act, and has no relation to the powers of the Commission, under sections 12 and 13 of the act, to compel, with the aid of the Court, answers to questions relevant to an investigation into alleged violations of the act.

CONCLUSION.

The judgment of the District Court should be affirmed and appellant required to answer the questions propounded and produce the documents demanded.

Respectfully,

E. MARVIN UNDERWOOD,

Assistant Attorney General.

APRIL, 1915.

APPENDIX.

QUESTIONS PROPOUNDED TO F. W. ELLIS AND BY THE COURT ORDERED ANSWERED.

[Court's order, Rec., pp. 137–142. Figures in parentheses following each question indicate the page of the record where question and its context appear.]

1. What position does he [C. B. Robbins, Pres., Armour Car Lines] hold with Armour & Company? (90)

2. What position does Mr. J. Ogden Armour hold with Armour & Company, or what is his connection with Armour & Company? (90)

3. Do any of the general officers and directors of Armour Car Lines occupy any position or maintain any relations with or to Armour & Company? (90)

4. How was title to the cars held by Armour & Company and by Armour Packing Company passed to Armour Car Lines? (91)

5. How were the cars of Armour Car Lines, the corporation that began in March, 1901, acquired? (91)

6. I understand, then, that Armour Car Lines is unwilling to state under what circumstances or conditions it acquired the equipment with which it does business? (91)

7. Who are the officers of the Fowler Packing Company? (92)

8. Will you furnish the Interstate Commerce Commission copies of your contract with Armour & Company for furnishing cars at different points, called for by any contract that exists? (93)

9. What is the nature of the understanding? (94)

10. In the next column, Mr. Ellis, under the head of other property, appears nothing at all. Did Armour Car Lines own any property other than their rolling stock? (102–3)

11. Where are the cars of Armour Car Lines repaired when not repaired in shops of railroads? (103)

12. With who– is settlement made, or by whom is settlement made to Armour Car Lines for refrigeration or icing service performed for Armour & Company? (107)

13. Is that for all ice furnished Armour & Company or just in certain instances that you so bill direct? (108)

14. Do Armour Car Lines manufacture all of their own equipment? (111)

15. Mr. Ellis, the Armour Car Lines were asked by the Interstate Commerce Commission to furnish, and I quote now from the written request, "an income statement showing in detail the credits to income from all sources and the debits to income of whatever nature and the total credits and total debits as shown by the books and records of the Armour Car Lines as a corporation for its last fiscal year."

I now ask you for the same statement with this modification that the Commission desires an income statement showing in detail the credits to income and the debits to income of whatever nature and the total credits and total debits as shown by the books of the Armour Car Lines, as a corporation, for its last fiscal year for so much of the business of Armour Car Lines as relates to or affects the furnishing of transportation, as that term is defined in section 1 of

the act to regulate commerce. I ask you if such a statement will be furnished? (112)

16. Do Armour Car Lines manufacture cars for other concerns than Armour Car Lines? (114)

17. Mr. Ellis, what do you mean by the statement that Armour Car Lines is engaged in the manufacture of cars? Do you mean that they are engaged in the manufacture of cars as a commercial proposition or as an incident to that business? (114)

18. What is done with the cars manufactured by Armour Car Lines? (114)

19. Is Armour Car Lines engaged in repairing cars owned by others than Armour Car Lines? (114)

20. Will you furnish an income statement showing in detail the credits to income and the debits to income of whatever nature, and the total credits and total debits as shown by the books and records of the Armour Car Lines as a corporation for its last fiscal year, of so much of the business of Armour Car Lines as relates to their business of owning, renting, and leasing cars, and furnishing icing and refrigeration service? (114)

21. Please furnish a statement showing in detail all credits and all debits to profit and loss, and the total credits and total debits as shown by the books and records of the Armour Car Lines as a corporation, for its last fiscal year, for so much of the business of Armour Car Lines as relates to their owning, renting, and leasing cars, and furnishing icing and refrigeration service. (114)

22. Mr. Ellis, please consider this a direction to furnish. Will you please furnish a statement showing the amount invested in each icing plant or station owned wholly or in part by Armour Car Lines at the

end of its last fiscal year; and by icing station is meant station at which icing and refrigeration is done? (115)

23. Another direction, Mr. Ellis. Will you please furnish a statement showing separately and in detail the results for your last fiscal year from the operation of each icing plant or station operated by Armour Car Lines; this statement to show the amount invested in each plant or icing station; the point or points at which the supply of ice was obtained for each station; the cost per ton at the source of supply; the freight rate per ton if transported by rail from point of supply to storage house; the cost per ton of labor and other expenses incident to storing; the total cost per ton placed in storage plants; the total cost per ton placed in bunkers or tanks of refrigerator cars; this statement also to show the number of tons stored in each house during the year; the number of tons sold or otherwise disposed of; actual or estimated loss in tons from meltage; total receipts and total disbursements in dollars and cents for each station, and the profit or loss from operation. (115)

24. Mr. Ellis, will you please furnish on behalf of the Armour Car Lines a statement showing the credits to income and the debits to income during your last fiscal year from each and every icing plant or icing station owned solely or in part or operated by Armour Car Lines? (116)

25. Will you please furnish a copy of the balance sheet, trial balance, as appearing on the books and records of Armour Car Lines at the end of your last fiscal year before accounts were closed? (116)

26. Also a copy of balance sheet, trial balance, as appearing on the books and records of Armour Car Lines for the last fiscal year after the books were

closed; these two requests being made separately. (116)

27. The question referred to asked for information from the date of incorporation of Armor Car Lines. I ask you now if you will give us information to the extent that you have already given it for those three years, to cover the period from the date of incorporation of Armour Car Lines? (117)

28. Mr. Ellis, why did Armour Car Lines report the last three years and not any further? Why did they stop at 1910? (117)

○

No. 712.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

FREDERICK W. ELLIS, APPELLANT,

v.

INTERSTATE COMMERCE COMMISSION, APPELLEE.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
EDW. W. KIMES,
Counsel for the Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

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Brimson, Baird, and *Harriman cases* distinguished. Final decrees only are appealable. An order requiring the production of testimony is not a final decree. (*Alexander* v. *U. S.*, 201 U. S., 117; *Webster Coal & Coke Co.* v. *Cassatt*, 207 U. S., 181; *Wise* v. *Mills*, 220 U. S., 549; *Haight* v. *Robinson*, 203 U. S., 581; *Hultberg* v. *Anderson*, 214 Fed., 349; *Logan* v. *Pennsylvania R. Co.*, 19 Atl., 137.) "Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court?" (*Alexander* v. *U. S.*, 201 U. S., 117.)

It is respectfully submitted that this appeal should be dismissed.

II. The orders of the Commission on which the investigation was based were sufficient to authorize the Commission to inquire whether or not Armour Car Lines was being used as a device to procure favors for Armour & Co. from the railroads 20

The purpose of the hearing at which appellant refused to testify, as indicated in the Commission's order providing therefor, was to determine whether or not the allowances paid by carriers for the use of private cars and the practices governing the handling and icing of such cars were unjust, unreasonable, unduly discriminatory, or otherwise in violation of the act. The interest of Armour & Co., and of other shippers, in the car lines furnishing such facilities was of the essence of the inquiry.

Investigations on the part of the Commission should not be hampered by the technical rules of the common law. (*I. C. C.* v. *Baird*, 194 U. S., 25, 44.) As to questions in issue Armour Car Lines was not taken by surprise.

ARGUMENT—Continued.

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III. The investigation in which appellant was called as a witness related to specific matters which might be made the object of a formal complaint, and was therefore one in which witnesses could be required to testify 22

Sections 1, 2, 12, 13, and 15 of the act to regulate commerce and sections 1 and 2 of the Elkins Act, cited.

The Elkins Act authorized inclusion as parties, "in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration." Armour Car Lines and Armour & Co. were served with copies of the Commission's orders and were made formal parties to the investigation in which appellant refused to testify.

One purpose of the inquiry was to determine whether or not the practices under investigation were resulting in unlawful discrimination. *Harriman* v. *I. C. C.*, 211 U. S., 407, distinguished.

IV. The information which the witness was asked to give was relevant to the inquiry which the Commission was making 27

The questions in issue were material as tending to show the relation between Armour & Co., the shipper, and Armour Car Lines, the corporation furnishing transportation and refrigeration facilities to common carriers; also as tending to show a practice of rebating under the guise of allowances from common carriers to Armour & Co. through the instrumentality of Armour Car Lines.

Cotting v. *K. C. Stock Yards Co.*, 183 U. S., 79, illustrative rather than exclusive of this proposition.

ARGUMENT—Continued. Page.

If the questions had a legitimate bearing upon the identity of Armour & Co. and Armour Car Lines, answers thereto were properly to have been compelled. (*I. C. C.* v. *Baird*, 194 U. S., 25, 47; *Nelson* v. *U. S.*, 201 U. S., 92.)

It is not contended that a corporation selling *supplies* to a railroad common carrier thereby subjects itself to the jurisdiction of the Commission. The contention is that a *shipper* may, through a corporation furnishing transportation facilities to such a common carrier, obtain rebates or concessions in the guise of allowances therefor, and that the Commission has jurisdiction to investigate the relations between such *shipper* and the corporation furnishing such facilities, in order to determine whether or not the latter is being used as a device to conceal rebates.

The questions asked were material as tending to advise the Commission as to the *reasonableness* of the allowances paid by common carriers for the services rendered by Armour Car Lines. It is the duty of the Commission to abate discriminative practices, "whatever form they may take and in whatsoever guise they may appear." (*Tap Line Cases*, 234 U. S., 1.)

The power of the Commission to inquire into the allowances of a tap line is based not upon the fact that the tap line is a common carrier, but upon the fact that it is owned by a *shipper*. A *shipper* owning a tap line is subject to the jurisdiction of the Commission with respect to the relations between the tap line, the *shipper*, and railroad common carriers. It is the duty of the Commission to inquire fully into such relations in order to determine whether or not the *shipper* by means of the tap line is securing concessions from the published rates. (*Tap Line Cases*, 234 U. S., 1.)

ARGUMENT—Continued. Page.

The Elkins Act was designed to place all shippers upon equal terms. (*U. S.* v. *Union Stock Yard Co.*, 226 U. S., 286; *I. C. C.* v. *Reichmann*, 145 Fed., 235.)

A witness, not a party to the proceeding, may not question on behalf of the corporation, a party thereto, the materiality of evidence. (*Nelson* v. *U. S.*, 201 U. S., 92.)

V. The witnesses who may be compelled by the courts to give testimony before the Commission and to produce documents, books, and papers are not limited to officers and agents of common carriers. 45

The Commission may require any person to testify before it if the testimony required relates to a matter under investigation, if such matter is one which the Commission is legally entitled to make, and if the witness is not excused on some personal ground from compliance with the Commission's order to testify. (*I. C. C.* v. *Brimson*, 154 U. S., 447.)

Congress, in excluding private car lines from the operation of the statute, was endeavoring to conserve the interests, not of private car lines, but of shippers. Clearly it did not intend thereby to deny to the Commission the power to require such corporations to disclose any information which might be necessary to enable the Commission to enforce the provisions of the act.

Jurisdiction over interstate transportation gives to the Commission jurisdiction over any person furnishing any part of that transportation, as to the transportation so furnished, whether or not such person is a common carrier.

ARGUMENT—Continued.

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VI. To require the Armour Car Lines, or its officer, to state what its books show, as to the result of its operations relating to its business of renting and leasing cars and furnishing refrigeration and icing service, would not unnecessarily invade the privacy of that corporation 51

Congress has the same authority to require Armour Car Lines to furnish to the Commission any information which may be necessary to enable it to determine whether or not the act is being violated as it would have if that corporation had been created by an act of Congress. (*Hale* v. *Henkel*, 201 U. S., 43; *I. C. C.* v. *Goodrich Transit Co.*, 224 U. S., 194.) *U. S.* v. *Louisville & Nashville R. Co.*, 236 U. S., 318, distinguished.

VII. The services furnished by car lines are furnished by them either as agents for the carriers or as agents for the shippers, and the Commission may investigate the charges for and the practices relating to such services as if such services were furnished directly by the carriers or the shippers 60

The act requires common carriers to furnish everything defined therein as transportation. A shipper may furnish on behalf of a carrier certain facilities required to be furnished, receiving therefor a reasonable allowance. Any person who performs such a service thereby subjects himself to the jurisdiction of the Commission to the extent necessary to enable the Commission to determine what is a reasonable allowance for the service so rendered.

Armour Car Lines furnish a transportation service which it is the duty of common carriers to provide, and must be regarded as performing that

ARGUMENT—Continued. Page.

service on behalf of such carriers within the purview of section 1 of the Elkins Act. The jurisdiction of the Commission therefore, for the purposes of this case, extends to Armour Car Lines as fully as if it were a common carrier subject to the act.

CONCLUSION 63

The questions propounded to Mr. Ellis, which he declined to answer and which he was required by the order of the District Court to answer, were material to issues cognizable by the Commission. Answers to such questions, if furnished, might have disclosed a violation of the act to regulate commerce or of the Elkins Act. Mr. Ellis, not being a party to the proceeding before the Commission, could not properly refuse to answer on the ground of personal privilege, nor could he plead the privilege of the corporation. Armour Car Lines, for the purposes of this proceeding, was as clearly amenable to the inquisitorial jurisdiction of the Commission as if it were a common carrier subject to the act. A reversal by this court of the judgment of the District Court would go far towards defeating the purposes for which the Commission was created. Wherefore it is respectfully submitted that the order of the District Court requiring Mr. Ellis to testify and to produce the documents in issue should be sustained.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

FREDERICK W. ELLIS, APPELLANT,
v.
INTERSTATE COMMERCE COMMISSION, appellee.
No. 712.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant seeks to set aside an order of the United States District Court for the Northern District of Illinois requiring him, as vice president of Armour Car Lines, to answer certain questions which he was directed by the Interstate Commerce Commission to answer, and to submit certain documentary evidence, directed by the Commission to be produced, at a hearing before the Commission, In the Matter of Private Cars, held at Chicago, Ill., January 22, 1914. The facts material to the issues are as follows:

Prior to June 5, 1912, it was conceived, by reason of certain complaints on file with the Commission, that the allowances paid by certain carriers subject to the act to regulate commerce for the use of private cars, the practices governing the handling and icing

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of such cars, and the minimum carload weights applicable to the commodities shipped therein were unjust, unreasonable, unduly discriminatory, and otherwise in violation of the statutes. On that date, accordingly, a hearing was instituted by the Commission, of its own motion and by appropriate order, for the purpose of determining the facts in question, and all carriers subject to the act to regulate commerce were notified thereof and made respondents thereto.

On October 8, 1912, a supplemental order was issued by the Commission and served upon the various carriers therein designated with a view to determining whether or not such carriers were furnishing adequate refrigerator-car service to shippers of fruit, vegetables, and fish from points on the Atlantic Coast Line Railroad in North Carolina to points north and east thereof on the lines of that carrier and on connecting lines.

The Commission thereafter concluding that certain individuals, firms, companies, and corporations, other than common carriers by railroad engaged in interstate commerce, owning or operating cars and other vehicles, instrumentalities or facilities of interstate commerce, were necessary parties to the proceeding in question, on September 15, 1913, issued a second supplemental order in the premises, directing that all such individuals, firms, companies and corporations, so owning or operating cars and other facilities, be made respondents to such proceeding. This order and the prior orders were thereupon served upon

various persons and corporations owning or operating cars and other facilities, including the Armour Car Lines, a corporation organized and existing under the laws of New Jersey, and engaged in furnishing cars and refrigeration facilities to common carriers engaged in interstate transportation, and Armour & Co., a corporation organized and existing under the laws of Illinois, that corporation being a shipper of interstate traffic in cars of Armour Car Lines over the lines of the respondent railroads. Accordingly, on January 22, 1914, the Interstate Commerce Commission, pursuant to the orders hereinabove described, conducted a hearing and investigation at Chicago, Ill., for the purpose of inquiring and examining into the premises. At such hearing appellant here, Frederick W. Ellis, in response to a subpœna duly served upon him, appeared, and after being duly sworn, stated that he was vice president, and that one G. B. Robbins, was president, of Armour Car Lines. The witness assented to the statement of counsel for the Commission that the business of that corporation is: "Renting and leasing of cars, and furnishing ice and refrigeration service" (Record, p. 112). He then was asked and directed to answer certain further questions which, on advice of counsel, he declined to answer, and to produce certain documentary evidence, which, on advice of counsel, he declined to produce. The Commission thereupon instituted in the United States District Court for the Northern District of Illinois, Eastern Division, proceedings whereby the witness might be compelled

to answer the questions asked and to furnish the information sought to be disclosed. In pursuance thereof, a hearing was held before District Judge Landis at Chicago, Illinois, on February 19–20, 1914, wherein the facts and circumstances in the premises were fully considered by the court; whereupon the respondent was ordered and directed by the court to answer the questions which he had declined to answer and to produce the documentary evidence which he had declined to produce. Respondent, in due course, moved the District Court for an appeal from the judgment rendered, but on November 9, 1914, that motion was denied. An appeal was thereafter granted by Mr. Justice Van Devanter on behalf of this court, on November 17, 1914, and the judgment of the District Court is now before this court for review.

The questions propounded to Mr. Ellis which he declined to answer, and which he was required by the order of the District Court to answer, are as follows:

> 1. What position does he [Mr. G. B. Robbins] hold with Armour & Company?
>
> 2. What position does Mr. J. Ogden Armour hold with Armour & Company or what is his connection with Armour & Company?
>
> 3. Do any of the general officers and directors of Armour Car Lines occupy any position or maintain any relations with or to Armour & Co.?
>
> 4. How was the title to the cars held by Armour & Company and by Armour Packing Company passed to Armour Car Lines?

5. How were the cars of Armour Car Lines, the corporation that began in March, 1901, acquired?

6. I understand then that Armour Car Lines is unwilling to state under what circumstances or conditions it acquired the equipment with which it does business?

7. Who are the officers of the Fowler Packing Company?

8. Will you furnish the Interstate Commerce Commission copies of your contract with Armour & Co. for furnishing cars at different points called for by any contract that exists?

9. What is the nature of the understanding (referring to a verbal agreement or arrangement with the Colorado Packing Company pursuant to which cars were furnished by Armour Car Lines to that company)?

10. In the next column, Mr. Ellis, under the heading of "Other property" appears nothing at all. Did Armour Car Lines own any property other than their rolling stock?

11. Where are the cars of Armour Car Lines repaired when not repaired in shops of railroads?

12. With whom is settlement made or by whom is settlement made to Armour Car Lines for refrigeration or icing service performed for Armour & Co.?

13. Is that for all ice furnished Armour & Company or just in certain instances that you so billed direct?

14. Do Armour Car Lines manufacture all of their own equipment?

15. Mr. Ellis, the Armour Car Lines were asked by the Interstate Commerce Commission

to furnish—and I quote now from the written request—"An income statement showing in detail the credits to income from all sources and the debits to income of whatever nature and the total credits and total debits as shown by the books and records of the Armour Car Lines as a corporation for its last fiscal year." I now ask for the same statement with this modification: That the Commission desires an income statement showing in detail the credits to income and the debits to income of whatever nature and the total credits and total debits as shown by the books of the Armour Car Lines as a corporation for its last fiscal year for so much of the business of Armour Car Lines as relates to or affects the furnishing of transportation as that term is defined in section 1 of the act to regulate commerce. I ask you if such statement will be furnished?

16. Do Armour Car Lines manufacture cars for other concerns than Armour Car Lines?

17. Mr. Ellis, what do you mean by the statement that Armour Car Lines is engaged in the manufacture of cars? Do you mean that they are engaged in the manufacture of cars as a commercial proposition or as an incident to that business?

18. What is done with the cars manufactured by Armour Car Lines?

19. Is Armour Car Lines engaged in repairing cars owned by others than Armour Car Lines?

20. Will you furnish an income statement showing in detail the credits to income and

the debits to income of whatever nature and the total credits and total debits as shown by the books and records of the Armour Car Lines as a corporation for its last fiscal year, of so much of the business of Armour Car Lines as relates to their business of owning, renting, and leasing cars and furnishing icing and refrigeration service?

21. Please furnish a statement showing in detail all credits and all debits to profit and loss and the total credits and total debits as shown by the books and records of the Armour Car Lines as a corporation for its last fiscal year, for so much of the business of Armour Car Lines as relates to their owning, renting, and leasing cars and furnishing icing and refrigeration service.

22. Mr. Ellis, please consider this a direction to furnish. Will you please furnish a statement showing the amount invested in each icing plant or station owned wholly or in part by Armour Car Lines at the end of its last fiscal year, and by icing station is meant station at which icing and refrigeration is done?

23. Another direction, Mr. Ellis. Will you please furnish a statement showing separately and in detail the results for your last fiscal year from the operation of each icing plant or station operated by Armour Car Lines—this statement to show the amount invested in each plant or icing station, the point or points at which the supply of ice was obtained for each station, the cost per ton at the source of supply, the freight rate per ton if transported by

rail from point of supply to storage house, the cost per ton of labor and other expenses incident to storing, the total cost per ton placed in storage plants, the total cost per ton placed in bunkers or tanks of refrigerator cars? This statement also to show the number of tons stored in each house during the year, the number of tons sold or otherwise disposed of actual or estimated loss in tons from meltage, total receipts and total disbursements in dollars and cents for each station, and the profit or loss from operation.

24. Mr. Ellis, will you please furnish on behalf of the Armour Car Lines a statement showing the credits to income and the debits to income during your last fiscal year from each and every icing plant or icing station owned solely or in part or operated by Armour Car Lines?

25. Will you please furnish a copy of the balance sheet, trial balance, as appearing on the books and records of Armour Car Lines at the end of your last fiscal year before accounts were closed?

26. Also a copy of balance sheet, trial balance, as appearing on the books and records of Armour Car Lines for the last fiscal year after the books were closed, those two requests being made separately?

27. The question referred to asked for information from the date of incorporation of Armour Car Lines. I ask you now if you will give us information to the extent that you have already given it for those three years

to cover the period from the date of incorporation of Armour Car Lines?

28. Mr. Ellis, why did Armour Car Lines report the last three years and not any further? Why did they stop at 1910?

The purpose for which the Commission sought the testimony which appellant was asked to give is thus stated in the petition:

> That prior to the institution by it of the proceeding hereinafter mentioned said Commission, by reason of the premises herein described and because of evidence adduced at said hearing, concluded it was its duty to ascertain whether, through stock ownership or by some other means to your petitioner unknown, said Armour & Co. was controlling said Armour Car Lines and using the same as a device to obtain concessions from the published rates of transportation on its said shipments from said carriers, or to obtain rates of transportation on its said shipments which were less than those contemporaneously applied to the transportation of like shipments of its competitors, or to obtain for it undue and unreasonable advantage which subjected such competitors to undue and unreasonable prejudice and disadvantage; or whether said Armour Car Lines was receiving from said common carriers for furnishing refrigerator cars and ice and for performing refrigeration services, as aforesaid, unreasonable compensation, which inured to the benefit of said Armour & Co., by reason of which the provisions of sections 1, 2, 3, and 15 of said act,

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above quoted, or any of them, had been or were being violated.

If the Commission is not entitled to compel the appellant to give the testimony sought for the purpose for which it has indicated in its petition that it desires the testimony, it is not entitled to have the testimony at all, and it would be useless to consider whether or not it might have been entitled to require the testimony to be given for some other purpose.

Full and frank answers to the questions asked would assist the court to determine whether or not the corporate organization of Armour Car Lines is being used in such a way as to enable its stockholders, or other persons, to procure rebates or favors of any kind from the railroads and thus to give them an undue advantage over other interstate shippers.

The questions which the appellant is required by the judgment appealed from to answer may be divided into three classes:

(1) Those which relate directly to the interest of Armour & Co. in the corporation known as the Armour Car Lines; (2) those which were intended to bring out facts which might justify the inference that such an interest existed; (3) those which relate to the reasonableness of the charges for the use of private cars and for the services of icing and refrigeration.

The questions of the third class had a twofold purpose. Those questions were intended to elicit facts which might enable the Commission to determine whether or not the allowances made to Armour

Car Lines and to other owners of private cars were so unreasonable as to amount to rebates and thus to create discrimination, and also to determine whether or not the charges made by the carriers against shippers for the services and facilities furnished by the owners of private cars were reasonable.

The restriction which the Commission by its petition has placed upon the purpose for which it desires the testimony makes the issues very simple. These issues are:

QUESTIONS INVOLVED.

1. Is the order of the District Court requiring Ellis to testify in the proceeding before the Commission appealable?

2. Were the orders of the Commission which formed the basis of the investigation sufficient to authorize the inquiry as to whether or not the Armour Car Lines was being used as a device to favor Armour & Co.?

3. Was the investigation to the extent that its purpose was to make such an inquiry one in which witnesses could be compelled to testify?

4. Was the testimony relevant to the inquiry?

5. Are the witnesses who may be compelled to testify before the Commission limited to officers and agents of common carriers?

6. Would it unnecessarily invade the privacy of the corporation to compel the testimony to be given?

7. May the Commission investigate the practices of private car lines acting as agents of railroad common carriers?

ARGUMENT.

I.

Is the order of the District Court requiring Ellis to testify in the proceeding before the Commission appealable?

This question presents a proposition not altogether free from doubt. The exact question has never been passed upon by any other court than the District Judge in this proceeding, by whom it was held that the order requiring Ellis to testify was merely interlocutory and not appealable.

Was the order requiring Ellis to testify a final order upon which a judgment by this court may be predicated? Would not the proper procedure have been for Ellis to obey the order of the court, in which event there would have been no occasion for an appeal, or for him to have refused to obey the order, in which event the court might have sentenced him for contempt? From the final order in such contempt proceedings an appeal would lie.

In other words, if an appeal is permitted from the seeming interlocutory order of the court requiring Ellis to give testimony, and this court should sustain the order of the District Court, could not Ellis again refuse to answer, and again appeal either from another order of the District Court requiring him to answer or from a judgment in contempt proceedings?

It does not seem to us that there is that finality about the order of the District Court which is essential to the jurisdiction of this court. The only case that has come before this court involving a direct

appeal from an order requiring a witness to answer questions for the Commission is the *Harriman case*, 211 U. S. 407. It should be noted, however, that in that case both Harriman and the Commission appealed, so the question was neither raised nor passed upon by this court.

In *I. C. C.* v. *Baird*, 194 U. S. 25, the Commission appealed to the Supreme Court directly from the judgment of the Circuit Court dismissing its petition praying that Baird be compelled to testify. An order of *dismissal* of a petition by the Commission, asking that a witness be compelled to testify, is unquestionably a final order and is not in any sense interlocutory, as an order *directing a witness to answer* questions might be considered.

In *I. C. C.* v. *Brimson*, 154 U. S. 447, the question was also presented of an appeal from a judgment of the Circuit Court dismissing the petition of the Commission praying that the witness be compelled to testify. As we have seen, such an order is unquestionably appealable.

In *Brown* v. *Walker*, 161 U. S. 591, Brown appealed to the Supreme Court, not from an order directing him to testify, but from a judgment of the Circuit Court denying him a writ of *habeas corpus*. The case grew out of his refusal to testify before the grand jury investigating alleged violations of the act to regulate commerce.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, Counselman appealed to the Supreme Court, not from an order requiring him to testify, but from a judgment

of the Circuit Court denying him a writ of *habeas corpus*. This case also grew out of the refusal of the witness to testify before a grand jury investigating alleged violations of the act to regulate commerce.

The appeal in the instant case is predicated upon the second section of the expediting act, which reads, in part, as follows:

> That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within 60 days from the entry thereof. * * *

The proceeding in the District Court was under that portion of section 12 of the act to regulate commerce reading as follows:

> And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court *as a contempt thereof*. * * * [Our italics]

Should not the next step after a refusal to obey an order of the court to testify be contempt proceedings

instead of an appeal to the Supreme Court? Should not the appeal be from the contempt proceedings rather than from the order requiring the witness to testify? *Nelson* v. *United States*, 201 U. S. 92.

The case of *Alexander* v. *United States*, 201 U. S. 117, seems to be controlling on this point. A witness, in a proceeding under the anti-trust act of 1890, who had refused to answer certain questions and to produce certain documents had appealed to the Supreme Court from an order of the Circuit Court directing him to answer and produce. The appeal was dismissed by the Supreme Court on the ground that the order of the Circuit Court was merely interlocutory, and did not constitute a final judgment from which an appeal would lie. Mr. Justice McKenna, in delivering the opinion of this court in that proceeding (p. 121), said:

> * * * To justify the appeals, appellants contend that the orders of the Circuit Court constitute practically independent proceedings and amount to final judgments. To sustain the contention, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, and *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, are cited.
>
> Those cases rested on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, *there are also differences.* In a certain sense, finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And

such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. *Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court?* Testimony, at times, must be taken out of court. In instances like those in the case at bar the officer who takes the testimony, having no power to issue process, is given the aid of the clerk of a court of the United States; having no power to enforce obedience to the process or to command testimony, he is given the aid of the judge of the court whose clerk issued the process, and if there be disobedience of the process or refusal to testify or to produce documents, such judge may "proceed to enforce obedience * * * or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court." Sections 868, 869, Revised Statutes. This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. *Prior to that the proceedings are interlocutory in the original suit.* * * * [Our italics]

Mr. Justice McKenna also in this opinion (201 U. S. 122) quotes with approval the following excerpt from an opinion by Mr. Justice Van Devanter, then Circuit Judge, disallowing an appeal from an order similar to that under review in the *Alexander case:*

> *I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision* and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit can not appeal or obtain a writ of error from that decision. [Our italics.]

It would appear that the District Court has as yet made no order against Ellis which is final. The order requiring him to testify in no way affects his liberty or his property. It is no more final than a subpœna would be with a *duces tecum* clause directing him to produce documents. An attachment for contempt

for failure to obey the order would seem to be requisite to constitute a final and appealable decree.

In *Webster Coal & Coke Co.* v. *Cassatt*, 207 U. S. 181, 186, the Supreme Court held that an order of the Circuit Court requiring the production of certain records was not a final decree from which an appeal would lie. This court, speaking through Mr. Chief Justice Fuller, said:

> * * * The order as to them (the witnesses) was purely interlocutory, not imposing penalty or liability, and not finally disposing of an independent proceeding. * * * *if the court had power to punish disobedience or enforce compliance, then the order prior to such action on the part of the court was clearly interlocutory in the suit.* * * * There was here no attachment for contempt, no judgment on default, and no independent and collateral proceeding, the order disposing of which could be considered as a final decree. [Our italics.]

See also *Wise* v. *Mills*, 220 U. S. 549; *Haight* v. *Robinson*, 203 U. S. 581; *Hultberg* v. *Anderson*, 214 Fed. 349; and *Logan* v. *Pennsylvania R. Co.*, 19 Atl. 137.

It is urged by counsel for appellant that this case differs from the *Alexander case* and the *Nelson case* in that in the instant case the Commission filed the proceeding in the District Court praying for an order requiring Ellis to give testimony, while in those cases the orders were made by the court hearing the original causes.

We submit that there is no difference in principle between the two classes of cases. The Commission has no power to punish for contempt, and in the event of a refusal of a witness to testify before the Commission the procedure provided by the statute is for the Commission to apply to the court for an order. The situation is the same as if the witness were to refuse to answer a question before a grand jury. The grand jury can not punish for contempt, but sends the witness to the court with a statement of the questions asked and of the refusal of the witness to answer. If the court in such a case orders a witness to answer the questions propounded by a grand jury, such an order would not be appealable. By what process of reasoning can it be contended that a request by the Commission to the court to require a witness to answer confers greater rights upon the witness than if the witness were testifying before the court as an original proposition? The requirement that the court must make the order is necessitated by the lack of power on the part of the Commission to punish for contempt just as in the grand jury proceedings mentioned. The order of the court requiring a witness to answer is no more final in one case than in the other; it is interlocutory in the one case as in the other, and for the same reasons.

As suggested by the Supreme Court in the *Alexander case* (201 U. S. 121), *supra*, "*Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned*

before a court?" Let the District Court for the Northern District of Illinois "go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case."

Until the District Court shall have entered an order punishing the respondent Ellis for his contumacy, there is, we submit, no basis for the assumption by this court of appellate jurisdiction of the order requiring the production of the evidence in question. Wherefore it is respectfully submitted that the appeal in the instant case should be dismissed.

II.

The orders of the Commission on which the investigation was based were sufficient to authorize the Commission to inquire whether or not Armour Car Lines was being used as a device to procure favors for Armour & Co. from the railroads.

The appellant insists that the orders of the Commission which formed the basis of the investigation in which the Commission sought the testimony which appellant refused to give did not afford any intimation that the Commission proposed to make inquiry as to whether or not Armour & Co. were interested in Armour Car Lines, but a consideration of the original order of the Commission shows that this contention is without foundation. The complaint, as stated by the Commission in that order, was that the "allowances" paid by carriers for the use of private cars and the practices governing the handling and icing of such cars were "unjust, unrea-

sonable, unduly discriminatory, and otherwise in violation of the act to regulate commerce." The charge that the "allowances" paid were unjustly discriminatory clearly implied that those allowances were made to shippers, and the extent of the interest of shippers in the car lines was of the very essence of the inquiry as to whether or not the allowances paid for the use of the cars were unjustly discriminatory.

In *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, this court said:

> The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof.

But even if the orders of the Commission had been too general to give notice that the purpose was to inquire into the actual ownership of the private car lines, that objection would not be available here, for the reason that counsel did not assign that as a reason for advising appellant not to give the information asked. The sole reason given for the advice of counsel to the witness not to answer the question was that the Commission had no authority under the act nor under the orders of the Commission to inquire into "the private business and

affairs of Armour Car Lines." The objection raises the general question as to the authority of the Commission to inquire into the matters as to which the witness was asked upon the ground that they are "private," and does not present the objection that the order was not sufficient to give notice that the Commission intended to inquire into the relation of the various car lines to persons who were shippers.

If the Armour Car Lines had made the objection as a party to the proceeding, and had claimed that it was taken by surprise, the Commission would, no doubt, have given it a reasonable time to prepare to meet the issue. Such investigations usually cover a considerable period of time, and there is not the same reason for that strict correspondence between allegation and proof that is required in court proceedings where time can not well be given to a party to meet unexpected issues.

III.

The investigation in which appellant was called as a witness related to specific matters which might be made the object of a formal complaint, and was therefore one in which witnesses could be required to testify.

The first section of the act defines "transportation" as including "cars, and other vehicles, and all instrumentalities and facilities of shipment or carriage, and all services in connection with the ventilation, refrigeration, or icing of property transported." By the same section and in the same

sentence, it is provided that it shall be the duty of every common carrier to furnish "such transportation" upon reasonable request therefor, and by a separate paragraph of the section it is provided that "all charges made for any service rendered or to be rendered in the transportation of passengers or property" shall be just and reasonable, and "every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." It will be noted that this clause is not directed against common carriers or against any particular person, but against the prohibited act itself without regard to the person by whom it may be committed.

Section 12 gives authority to the Commission to inquire into the management of the business of all common carriers subject to the act, and provides that "for the purposes of this act" the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and "the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." By the same section the Commission is also authorized to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents. Section 13 of the act provides for complaints against common carriers. No authority seems to be given to the Commission by the original act, therefore, to entertain formal complaints against persons other than common carriers.

The defect in the original act in failing to provide for complaints against persons other than common carriers was remedied by section 2 of the amendment of February 19, 1903, known as the Elkins Act, which reads as follows:

> That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission, or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Pursuant to the provisions of the act as thus amended, Armour & Co. and Armour Car Lines were made parties to the investigation in which appellant was called as a witness, and were duly served with copies of the orders of the Commission which formed the basis of the investigation.

By section 2 of the act to regulate commerce it is provided:

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater

> or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

By section 1 of the Elkins Act, it is provided that it shall be unlawful for "any person, persons or corporation" to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination "in respect to" the transportation of any property in interstate or foreign commerce by any common carrier subject to the act whereby any "advantage is given or discrimination is practiced."

Section 15 of the original act contains the following provision:

> If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered, or for the use of the instrumen-

> tality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

One of the purposes of the investigation in question was to ascertain whether or not there was unjust discrimination resulting from a violation of any of these various provisions.

The case of *Harriman* v. *Interstate Commerce Commission* 211 U. S. 407, upon which counsel for appellant chiefly rely, was based upon the sole ground that the matter which the Commission was investigating when it sought to compel the witness to testify was not a "specific matter that might be made the object of a complaint." The relevancy of the testimony sought did not enter into the inquiry. The court held merely that the purpose for which the investigation was being made was not one of the purposes for which the Commission had the power to compel witnesses to testify.

That the Commission in this case, under orders duly served on the railroads, on Armour Car Lines, and on Armour & Co., was investigating the reasonableness of allowances paid by carriers for the use of private cars, and of the practices governing the handling and icing of such cars, and also inquiring whether or not such allowances and practices were unjustly discriminatory, and amounted to rebates to Armour & Co., shippers of freight, is admitted, and that these were specific matters which might be made

the object of a complaint under sections 1, 2, 3, 13, and 15 of the act can not be denied. It is clear, therefore, that the *Harriman Case* can have no application here.

IV.

The information which the witness was asked to give was relevant to the inquiry which the Commission was making.

Some of the car lines are controlled by large shippers, others are controlled by the railroads, and others are entirely independent.

It appears that in some cases the shippers deal directly with the car lines for the use of their cars while in other cases they deal with the railroads alone for the use of such cars. One of the practices of which complaint is made is that some of the larger shippers through contracts with the car lines are able to procure the exclusive use of their best cars, leaving only inferior cars for the use of those shippers who procure their cars through the railroads, which, having no special equipment of their own, must take for their shippers what the car lines have to offer them, such shippers being required, the complaint implies, to pay for the use of the inferior cars at least as much as their competitors pay for the newer and better cars which they obtain by their contracts with the car lines. (Record, pp. 11, 21, 76, 78.) Complaint is also made that shippers who are interested in the car lines and in the icing stations which they maintain are able to and do give their own shipments the preference over the shipments of other

persons in the matter of icing cars. (Record, pp. 42, 59, 70.) It also appears that when complaints are made by shippers to the railroads that their shipments are not properly iced and handled the railroads make answer that they are not able to furnish a detailed icing record because this information is not furnished by the car lines. (Record, p. 76.) All these things emphasize the fact that it would be impossible for the Commission to prevent discrimination if it could not inquire very closely into the relations existing between shippers and the car lines.

No argument is needed to show that the questions relating directly to the interest of Armour & Co. in Armour Car Lines was relevant. It appears that Armour & Co. are shippers who use the cars of the Armour Car Lines and also the refrigeration and icing service of that company, and that in some cases Armour Car Lines deal directly with Armour & Co. (Record, pp. 13, 93). For the use of the cars of Armour Car Lines and for the refrigeration and icing service of that corporation the carriers make certain allowances. It also appears that prior to March, 1901, Armour & Co. and Armour Packing Company owned refrigerator cars which were operated by them in another corporate name, but Armour Car Lines was then organized and acquired title to the cars, but how that was done the witness refused to state. (Record, p. 91.) If Armour & Co. directly or indirectly owns or controls Armour Car Lines, allowances made to Armour Car Lines are allowances made to

Armor & Co., and if these allowances are unreasonable, the act is violated.

The various items of debit and credit which entered into the accounts and also the net result of the operations of the company were all material as bearing on the cost of the services furnished, while the value of the property used in performing the services was important to show the return upon the investment, as that return, if excessive, would tend to show that all the charges were extortionate, and that the allowances made to Armour Car Lines were resulting in unjust discrimination.

Counsel rely on the case of *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 93, to show that the aggregate profits of Armour Car Lines are not a factor in determining the reasonableness of its rates. Counsel seem to have overlooked the fact that the language which they quote from the opinion of Mr. Justice Brewer in that case was not the language of the court. Six of the justices refused to concur in that reasoning of Mr. Justice Brewer and placed their concurrence in the reversal of the judgment of the lower court upon an entirely different ground. Besides, in a later part of this opinion Mr. Justice Brewer used language very materially qualifying that quoted. Referring to the opinion of Lord Chancellor Selborne in the case of *Canada Southern Railway Co.* v. *International Bridge Co.*, 8 App. Cases, 723, 731, Mr. Justice Brewer said (p. 97):

> Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne,

> that the amount of aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the question of reasonableness. Now, the controversy in the Circuit Court proceeded upon the theory that the aggregate of profits was the pivotal fact. To that the testimony was adduced, upon it the findings of the master were made, and in recognition of that fact the opinion of the court was announced. Obviously, as we think, in all this the lines of the inquiry were too narrowly pursued.

Therefore, Mr. Justice Brewer's opinion distinctly upholds our contention here. There is nothing whatever in the record to indicate that the Commission proposed to make the aggregate profits of the corporation the pivotal fact, but the Commission, no doubt, recognized the difficulty of determining the reasonableness of the allowances in question by comparisons, and therefore felt it to be its duty to consider all the facts which might properly enter into the solution of the problem. If the Commission should fix the amount of these allowances, and Armour Car Lines should attack the allowances fixed as confiscatory, they would have the right to show the return which the rates would yield to be so low as to be confiscatory, and for that purpose would have the right to show the value of their property employed in the business and their aggregate profits. That being true, the Commission is entitled to this information in advance so that it may avoid fixing the allowances

so low as to be confiscatory. The aggregate of the profits may be in some cases as important in determining whether or not a single rate would be confiscatory as it is in determining whether the entire body of a carrier's rates would be confiscatory. *Northern Pacific Ry. Co.* v. *State of North Dakota*, opinion of Mr. Justice Hughes March 8, 1915. It is true that the Commission may have no power here except to determine whether or not the allowances are so unreasonable as to amount to rebates, and to fix allowances for the future which will not be subject to that objection, but allowances so fixed might be attacked as confiscatory.

Counsel say that if the Commission can inquire as to the cost of the cars furnished by Armour Car Lines and require that company to make a financial statement showing the result of its operations, the Commission may require every person who sells an engine to an interstate carrier to make a like statement. The cases, however, are quite different. No specific charge is made for the use of engines and an engine is not ordinarily set apart for a particular service for which a distinct charge is made. In the case of refrigerator cars, however, a separate charge is made for the use of the car, and it is impossible to determine the reasonableness of the charge unless the value of the car is known. The cars are of a peculiar type and unless their cost can be ascertained together with the profit from the manufacture and rental, it will be difficult to determine what would be a reasonable rental for them. The furnishing of

these cars and of refrigeration and icing service is a part of transportation which the act requires the railroads to furnish and which it was contemplated they probably would furnish through private car companies and differs materially from the furnishing of things which are not defined as "transportation."

But the details of the accounts were also important as bearing on the preliminary question as to the interest of Armour & Co. in Armour Car Lines. It is quite possible that such evidence would show an intermingling of the business of the two corporations which would go far toward establishing the fact that it is a matter of indifference to the stockholders whether their profits come from the one corporation or the other, and thus show that the two corporations are substantially one. As long, therefore, as the identity of the two corporations is not admitted, the items which enter into the accounts of the Armour Car Lines are of the greatest importance for the purpose of enabling the Commission to reach a correct conclusion as to whether or not the two corporations are for all material purposes the same, or as to whether or not Armour & Co. is receiving through Armour Car Lines some concession which amounts to a rebate. If the testimony would have a legitimate bearing on the question to be determined it may be compelled. In *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 47, where this court held that the production of contracts which might tend to show a pooling of freights, in violation of the fifth

section of the commerce act, could be compelled, the court by Mr. Justice Day said:

> While this testimony may not establish such an arrangement as is suggested, it has, in our opinion, a legitimate bearing upon the question. There is a division of freight among several railroads, where by agreement or otherwise, the companies have a common interest in the source from which it is obtained. Furthermore, we think the testimony competent as bearing upon the manner in which transportation rates are fixed, in view of determining the question of reasonableness of rates, into which the Commission has a right to inquire. To unreasonably hamper the Commission by narrowing its field of inquiry beyond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purposes for which it was established by Congress.

Nelson v. *United States*, 201 U. S. 92, was a proceeding to compel the officers of the General Paper Company and other corporations to answer questions propounded to them as witnesses in a proceeding brought by the United States in the United States Circuit Court for the District of Minnesota to annul certain contracts and agreements between the corporations referred to upon the ground that those contracts and agreements were entered into pursuant to a conspiracy in restraint of trade in violation of the anti-trust act of July 2, 1890, the General Paper Company being organized by the other corporations,

as was alleged, for the purpose of carrying out that conspiracy. The witnesses were required by the trial court to produce and to answer certain questions as to the contents of the account books of the several corporations showing among other things "the amounts and proportions of earnings or profits of the paper company received by the respective companies from and through the paper company either in the form of rebates, credits, or otherwise." Holding that the witnesses were properly required to produce the account books and to answer the questions relating to their contents, this court said (p. 112):

> The questions were framed to prove the combination charged in the bill and the powers and operation of the General Paper Co. and the relations of the other companies to it. What the answers will show we do not know, nor what the books and documents will disclose. The organization of the paper company had a purpose, and whether it was a legal or illegal instrument for competing companies to use we do not have now to determine. By the admissions of the answers the paper company entered into contracts with those companies, became their selling agent, and was entitled to a certain percentage of the sales. Presumably it exercised its powers, made sales and received profits. In all that it did the manufacturing corporations were interested; they owned its stock, were entitled to its dividends. This we may admit for argument's sake, not prejudging in any way, may be consistent with continued competition

> between the companies, but it may be otherwise. At any rate, the manner in which the paper company executed its functions may be links in the evidence adduced by the United States, and this is enough to establish the materiality of the evidence.

The Armour Car Lines, as we have seen, was a proper party to the investigation in which appellant was called as a witness, but even if that corporation had not been a party to the investigation, that fact would not have entitled it to claim that it could not be required to expose its business affairs if such exposure was necessary to enable the Commission to determine the reasonableness of the allowances made to it by the carriers.

By section 15 of the act the Commission has power to inquire into any device whatsoever which it believes is being used by a shipper to procure from a carrier an excessive allowance for the furnishing of cars or refrigeration in connection with interstate transportation; and such an allowance may be procured by a shipper through the control of a private car line just as effectually as through the control of a tap line. Therefore, what this court said in the *Tap Line cases*, 234 U. S. 1, 28, is in point here. The court, by Mr. Justice Day, there said:

> It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines, and in their dealings with other carriers which have resulted in unfair advantages

> to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as nonproprietary traffic, and as such entitled to participate in joint rates with other common carriers, that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does.

Surely the facts which the Commission was seeking to elicit here were relevant for the purpose of showing that Armour & Co. were "indirectly" receiving rebates and concessions which were unlawful, as well as for the purpose of showing what would

be reasonable charges for the services in question and what would be reasonable practices relating thereto.

It may be said that the tap lines are common carriers and that for that reason the Commission has jurisdiction over them, while the Armour Car Lines is not a common carrier, and that this distinguishes the *Tap Line cases* from this case. Conceding for the purpose of the argument merely that the Armour Car Lines is not a common carrier, there is no substantial ground for distinguishing the cases for the reason that the authority of the Commission to inquire into the allowance made to the tap line is not based upon the fact that it is a common carrier, but upon the fact that it is owned by a shipper. It is true the Commission has jurisdiction of the tap line as a common carrier, but by virtue of section 2 of the Elkins Act it also has jurisdiction of the Armour Car Lines as a party "interested in or affected by" the rate or practice, and may make orders against it "in the same manner and to the same extent as if it were a common carrier."

The case of *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, shows that the court will not permit either carrier or shipper by any device whatsoever to violate the provisions of the act prohibiting unjust discrimination. The court in that case, in an opinion by Mr. Justice Day, held that the Union Stock Yard & Transit Co. of Chicago, which owned a railroad, did not exempt itself from the operation of the act to regulate commerce by leasing its railroad and

equipment to an operating company, the profits of which it shared, both companies being under a common stock ownership. The court then held that a contract between the Stock Yard Company and a packing company by which the Stock Yard Company undertook to pay to the packing company a large bonus to locate its plant adjacent to the stock yards of the Stock Yard Company, the packing company agreeing to buy and use in its slaughtering business such live stock only as moved through such stock yards, had the effect to give the packing company an undue advantage over other persons who shipped over the railroad, in the operation of which the Stock Yards Company had an interest, and was therefore in violation of the act. In conclusion the court said (p. 309):

> It is the object of the interstate commerce law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms.

So here the Commission was authorized to inquire into the relation of Armour & Co. to the Armour Car Lines, the contracts between them, the allowances made by the railroads to Armour Car Lines, and the reasonableness of these allowances, for the purpose of ascertaining whether or not there was any favoritism to Armour & Co. through the Armour Car Lines.

Interstate Commerce Commission v. *Reichmann*, 145 Fed. 235, was a proceeding by which the Commission

sought the aid of the court to compel a witness to answer a question in an investigation in which the Commission was endeavoring to ascertain how the managers or owners of cars not owned by carriers but employed by them in the interstate transportation of freight conducted their business. An officer of a car line which owned a large number of live-stock cars for the use of which the railroads paid the car line on a mileage basis was called as a witness but refused to answer the following question: "What part of the mileage, or from whatever source, have you given up to shippers during the last six months?" In an elaborate opinion District Judge Landis, the presiding judge, held that the witness should be required to answer the question. After stating that the cardinal purpose of the original act was to bring about absolute uniformity throughout the realm of interstate transportation and that the reason that the act had failed to accomplish that purpose was due primarily to the fact that its prohibitions were aimed at and operated only on carriers, Judge Landis said (p. 239):

> Its provisions did not extend to and embrace persons and corporations interested in or concerned with the transportation business other than carriers, and their agents and shippers remained at full liberty to exact from railway companies transportation service at lower rates than were accorded patrons generally. If lower rates were given, the carrier, only, was guilty of an offense. The principal effect of the law seems to have been to require the resort to roundabout methods for the pur-

pose of evading uniformity. The records of the proceedings of the courts and of the Interstate Commerce Commission, during the years succeeding 1887, disclose the employment of a large variety of means to evade the law. One of these was the use of the so-called private car; that is, a car which did not belong to the railway company, but did belong either to the shipper himself or to a corporation which was neither carrier nor shipper, it being generally understood that in the case of the shipper whose traffic went forward in his own car, excessive payments were made to him on the alleged score of mileage, which, in effect brought his transportation cost below the regular rates, and in the case of the shipper whose goods were vehicled in cars belonging to a car company, payments of money, as commissions or otherwise, were made to him by or through the medium of such private car company; the effect of which was to give him the service at a cost below the regular tariff.

These various evasions had developed to such an extent that at the session of 1902–3, Congress set about to devise a plan to put a stop, once for all, to transportation favors. The previous endeavor to accomplish this by penalizing acts of favoritism committed by carriers and their agents having proved abortive, and the experience of 15 years under the original act having demonstrated that if shippers of property were to be placed on an absolute level of equality, additional prohibitory legislation extending to shippers and to persons and corporations beyond or behind

> the railway company was necessary, the law of 1903 was enacted.

Judge Landis then quoted from the Elkins Act, and in conclusion said (p. 242):

> I am of the opinion that the law prohibits the car company from giving to any shipper of property a favor or advantage not publicly offered to all shippers by the published tariffs issued by the carrier, and therefore that a reply to the question, which the witness refused to answer, would give the Commission information respecting a matter as to which it is charged with the performance of a duty.

It appears from the evidence before the Commission that Armour & Co. and Armour Car Lines have a contract of some kind by which Armour Car Lines undertakes to furnish cars to Armour & Co. (Record, p. 93). But this contract the witness refused to produce. Surely the Commission was entitled to have this contract produced that it might know whether or not Armour Car Lines is making payments to Armour & Co. which would operate as rebates under the principle of the *Reichmann case.*

The case of *United States* v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007, decided by Circuit Judges Grosscup, Baker, Seaman, and Kohlsaat, in an opinion by Circuit Judge Baker, shows that there are other means besides that of stock ownership of a shipper in a car company by which a car company may become, in effect, a shipper, and may procure undue favors from railroad companies in violation of the commerce act. That was a proceeding insti-

tuted by direction of the Attorney General of his own motion to enjoin the Milwaukee Refrigerator Transit Company, a brewing company, and certain railroads as defendants from continuing practices which were claimed to be in violation of the Elkins Act. Discussing the practices of the refrigerator company the court said (p. 1011):

> The company owns refrigerator cars which it places at the disposal of railroad companies for use by them in handling certain kinds of traffic, and they pay it rent for the cars in the form of mileage. There is neither averment nor proof which attacks the company in its character of lessor of cars to the railroads.
>
> But, under the conceded facts, as we view them, the refrigerator company in its relations with the railroads appears in another rôle—that of shipper. From the brewing company and other owners of goods intended for interstate and foreign transportation the refrigerator company obtains the exclusive right to route the shipments to all competitive points, and then withholds or gives the business according to the railroad companies' resistance or submission to the threat of diverting the traffic unless a tenth or an eighth of the freight moneys be paid to it. Control of the traffic is as absolute in the refrigerator company as if it were owner, and in numerous transactions the owner is not the shipper. And if an owner, having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner

and shipper. In this case, if the refrigerator company bought the beer, and paid the brewing company's bill less freight, and then collected the beer accounts, and paid the railroads seven-eighths or nine-tenths of the published rates, the granting of a rebate or concession by a carrier to a shipper would not be denied, we take it; and yet, so far as ledger balances and profits of the brewing company, the refrigerator company, and the railroads are concerned, the present method in its results is precisely that.

The foregoing consideration is in answer to defendants' insistence that the Elkins Act touches only the carrier and the shipper. But under the strictest construction (and that the act should be fairly interpreted to effectuate its remedial purposes, see *New York, etc., R. M. Co.* v. *Interstate Commerce Commission* [U. S. Sup., Feb. 19, 1906], 26 Sup. Ct., 272), we think it was designed to restrain all "parties interested in the traffic."

In section 1:

"It sh. ll be unlawful for any person, persons, or corporation * * * to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

In section 2:

"It shall be lawful to include as parties, in addition to the carrier, all persons interested

> in or affected by the rate, regulation, or practice under consideration."
>
> And in section 3:
>
> "Upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs * * * by proper orders, writs, and process * * * as well against the parties interested in the traffic as against the carrier."
>
> So, if the refrigerator company be not considered as the shipper, it is at least a "party interested in the traffic."

We do not mean to say that such an arrangement as is there described exists as between Armour & Co., Armour Car Lines, and the railroads, but the case illustrates the importance of giving the Commission some latitude for the purpose of finding out whether that or some other device is being used to defeat the law. It is quite probable that as that particular device has been condemned by the courts it has been avoided, but as the court well said (p. 1013):

> The inhibition of "any device whatever" that accomplishes the condemned results is a ban upon invention in this field.

It is immaterial, however, whether or not the testimony was relevant, as a witness can not question the materiality or relevancy of evidence. If it be said that the witness represented the corporation, and that the corporation must be regarded as the witness, the answer is that the same rule applies to the corporation unless the objection made by the witness be regarded as made by the corporation as a

party, but the objection can not be so regarded in view of the fact that the corporation claimed that it was not a party and entered merely a special appearance for the purpose of objecting to the jurisdiction of the Commission.

In *Nelson* v. *United States, supra,* this court said (p. 115):

> These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal, as we shall presently see.

V.

The witnesses who may be compelled by the courts to give testimony before the Commission and to produce documents, books, and papers are not limited to officers and agents of common carriers.

The power of the Commission to require witnesses to testify is not limited to any particular class of witnesses. Any person who probably has information which it is important for the Commission to have in order to reach a correct conclusion relating to a matter which the Commission is expressly charged with the duty of investigating upon formal complaint may be required to give that information in a proceeding duly instituted by the Commission of its

own motion unless he can show some personal reason for not giving the information sought.

In *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 476, this court said:

> As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon anyone summoned by that body to appear and to testify, the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands.

It is unlawful for the Armour Car Lines to use its corporate organization in such a way as to procure favors for its stockholders which the act to regulate commerce prohibits them from receiving; and to ascertain whether or not the corporation is violating the law in that way, the Commission must have the right to call upon the officers of the corporation to testify as to who the stockholders are and as to how the corporation is conducting its business.

In *Interstate Commerce Commission* v. *Brimson*, *supra*, in which the court held section 12 of the act to be constitutional, the lower court had refused to

require the witness to give the testimony sought upon the sole ground that the section was unconstitutional, and this court reversed the judgment, saying that it would not pass upon the relevancy of the questions which the witness had refused to answer until the lower court had done so. In that case the Commission applied to the court to require an officer of the Illinois Steel Co. to produce the stock books of that company and to testify as to the relation of that company to certain railroad companies which it was charged that it had organized for the purpose of procuring certain favors as a shipper. Of course, if the mere fact that the corporation was not itself a common carrier had been a sufficient reason for not requiring its officer to testify as to its affairs or to produce the books of the corporation, the court would have said so, but the court sent the case back, that the lower court might pass upon the materiality of the evidence.

Counsel for appellant insist that the debates of Congress show that car lines were not intended to be regarded as common carriers, and while that is not conceded, yet it is quite clear from the same debates that Congress did not intend to relieve the car lines of any of the obligations which rested upon them, but intended merely that the shippers should have the right to hold the carriers responsible for the service of the car lines, and the right, if they elected to do so, to contract only with the carriers, thus leaving the carriers to deal with the car lines

unless they should elect to perform directly the service usually furnished by those lines. The interests of shippers were uppermost in the mind of Congress, and whatever authority the Commission in the interest of shippers would have had to inquire into the conduct of the business of the car lines if they had been declared to be common carriers, it must be held that it now has unless its power in that respect is clearly limited by the language used.

It is provided that unjust and unreasonable charges for any service expressly declared by the Act to be "transportation" shall be unlawful without regard to whether those charges are made by the carrier or against the carrier. Other sections of the act declare that it shall be unlawful for any common carrier to do certain things, but the first section provides that unreasonable charges for the services named shall be unlawful without regard to the person who makes the charges. When we consider the fact that it was known to Congress that the railroads themselves did not ordinarily furnish special equipment such as refrigerator cars or the service of refrigeration and icing, and were largely at the mercy of private car companies as to the charges made for the use of such equipment and for such services, the reason for the language used is apparent if counsel for appellant are right in their contention that private car lines are not common carriers. Of course, the railroads pass on to shippers whatever charges are made for such special services, and if the Commission is power-

less to ascertain the costs of such services it can not determine what would be reasonable rates therefor, and shippers must suffer.

In *Hale* v. *Henkel*, 201 U. S. 43, 70, the court, referring to the claim of the agent of a corporation that he could not be compelled to give testimony which might incriminate the corporation, said:

> Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject.

Congress evidently contemplated that the railroads would continue to employ car lines to furnish a part of the transportation service which the railroads were required to furnish, and yet what use was it for Congress to say that the charges made for such services should be reasonable and nondiscriminatory if the door of access to the only available source of information as to the reasonableness of the charges was to be closed? And the question may also well be asked as to the use of providing that shippers shall not receive unreasonable allowances for services furnished by them if a shipper may become the sole stockholder of a corporation organized to furnish the service and receive the allowance without any right on the part of the Commission to inquire into the affairs of that corporation. It seems to be conceded that Congress would have had power to declare car lines to be common carriers and to require them to make reports and to make them subject to all the provisions of the act

to which railroads are subject, and when we look to the reasons given in debate why they should not be declared common carriers, we find that the interest of shippers and not the interest of the car companies was considered paramount, and that the members of Congress who insisted that the car lines should not be named as common carriers had no thought of denying to the Commission the authority to require them to furnish such information as might be necessary to enable it to prevent violations of the act.

It is made clear by the debates quoted by counsel for appellant that it was for the express purpose of meeting the case of the car lines that the word "transportation" was defined as including "cars" and all services in connection with the icing and refrigeration of shipments in transit, and that it was the intention of Congress to give the Commission jurisdiction over these things regardless of the person by whom they might be furnished. Jurisdiction over any part of interstate transportation gives the Commission jurisdiction over the person who furnishes that part of transportation, as to the transportation so furnished, whether or not he be a common carrier. Just as the Commission has jurisdiction over the shipper to the extent that it may be necessary to ascertain whether or not he has violated the commerce act, so it has jurisdiction for the same purpose and to the same extent over any person furnishing interstate transportation against whom a specific complaint has been duly filed, or who is a party to an investigation instituted by the Commis-

sion for the purpose of ascertaining whether or not there has been a violation of the commerce act, to correct which such a complaint properly might have been filed.

VI.

To require the Armour Car Lines or its officer to state what its books show as to the result of its operations relating to its business of renting and leasing cars and furnishing refrigeration and icing service, would not unnecessarily invade the privacy of that corporation.

In 3 Wigmore on Evidence, section 2192, it is said:

> When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon.

Again in section 2211 the same author says:

> The mere fact that a document concerns the private affairs of the witness or that its disclosure would in his opinion inconvenience him does not create a privilege. The duty to assist the truth (ante sec. 2192) is paramount and indeed presupposes some sort of sacrifice by the witness.

If these principles apply to the private citizen, they apply with much greater force to *quasi* public corporations, or rather they are supplemented and extended in the case of such corporations by the power which both the State and Federal governments have over all corporations, and especially over *quasi* public corporations.

The Armour Car Lines is a corporation created by the State of New Jersey, and Congress has the same authority to require it to give information to the Interstate Commerce Commission for the purpose of enabling that body to determine whether or not the corporation is using its corporate organization to evade any provision of the act to regulate commerce as it would have if the corporation had been created by an act of Congress.

In *Hale* v. *Henkel*, 201 U. S. 43, 75, which involved the right of the United States, by *subpœna duces tecum* to require the officer of a New Jersey corporation to appear before a federal grand jury and bring with him the books and papers of the corporation, the court said (p. 75):

> It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such

franchises have been exercised in a lawful manner with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over State corporations.

In the same case the court said further (p. 76):

Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the McAndrews & Forbes Co. and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the McAndrews & Forbes Co., as well as all letters received by that company since its organization from more than a dozen different companies situated in seven different States in the Union.

If the writ had required the production of all the books, papers, and documents found in the office of the McAndrews & Forbes Co.,

> it would scarcely be more universal in its operation or more completely put a stop to the business of that company. * * * A general subpœna of this description is equally indefensible as a search warrant would be if couched in similar terms.

The court then added (p. 77):

> Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the fourth amendment.

The reasons given for holding the subpoena issued in that case to be so sweeping as to constitute an unreasonable search or seizure do not apply here. The appellant was not required to bring with him any papers except a copy of one contract specifically described and certain statements to be taken from books of accounts of the corporation. It was not claimed that to produce these papers would involve any considerable amount of labor, or would interfere in any way with the operations of the company. Nor was it claimed that the requests were not sufficiently specific. The statement of counsel for Armour Car Lines of the ground of the objection of that corporation to giving information as to the position which Mr. G. B. Robbins, the president of Armour Car Lines, holds with Armour & Co., which we have already quoted, was referred to as the ground

for refusing to furnish all the information asked, including the documentary evidence referred to.

The sole question is, therefore, whether or not to require the information to be given would invade the privacy of the corporation. Much of what the court said in *Hale* v. *Henkel*, *supra*, as to the right of the agent of a corporation to claim that he could not be required to open the books of the corporation to a Federal grand jury for the reason that to do so might incriminate the corporation applies with especial force here, although the ground of the objection to giving the information asked differs from the ground of the objection to producing the books and papers which the witness in that case was asked to produce. The court there said (p. 74):

> Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business or to open his doors to an investigation, so far as it may tend to

criminate him. He owes no such duty to the State since he receives nothing therefrom beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitation of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

In *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, the court upheld the power of the state to require a foreign corporation doing business in the state to produce before a grand jury all its books, papers, and correspondence which related to the subject of inquiry, and the court held that this power, of course, embraced the authority to require the giving of testimony by the officers, agents, and other employees of the corporation for like and analogous purposes.

In *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 348, the court held that the State of Arkansas had the right to compel the production of the books and papers of a foreign corporation doing business in the state, in an investigation to determine whether or not the laws of the state had been complied with, although the books and papers had never been kept within the state.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, the court, holding that the Commission had power to prescribe how common carriers of interstate commerce should keep their accounts relating to their intrastate business as well as their accounts relating to their interstate business, said (p. 211):

> The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corpora-

> tions subject to the act, that it may properly regulate such matters as are really within its jurisdiction.

And again in the same case the court said (p. 215):

> And it is argued that Congress had no visitorial power over state corporations. We need not reassert the ample power which the constitution has been construed to confer upon Congress in the regulation of interstate commerce, declared in the many cases in this court from *Gibbons* v. *Ogden*, 9 Wheaton, 1, to its most recent deliverances. In *Hale* v. *Henkel*, 201 U. S. 43, 75, while general visitorial power over state corporations was not asserted to be within the power of Congress, it was, nevertheless, declared as to interstate commerce that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress.

In *Interstate Commerce Commission* v. *Baird, supra*, the court further said (p. 46):

> Undoubtedly the courts should protect non-litigants from unnecessary exposure of their business affairs and papers. But it certainly can be no valid objection to the admission of testimony, otherwise relevant and competent, that a third person is interested in it.

Counsel for appellant rely upon the late case of *United States* v. *Louisville & Nashville R. R. Co.* 236 U. S. 318 in which this court affirmed a judgment of the United States District Court for the Western District of Kentucky refusing a writ of mandamus which

the United States undertook to obtain under authority of section 20 of the act to regulate commerce as amended, 34 Stat. 584, 594, 595. The ground upon which the decision was based was that the power given to the Commission by that section to employ special agents and examiners with authority under order of the Commission to examine "accounts, records, and memoranda" kept by carriers did not give the Commission the right through such agents and examiners to examine the correspondence of the carriers to which the Commission sought access in that case, that correspondence relating to various matters which did not pertain to the provisions of the act to regulate commerce or any other act of Congress the provisions of which it is made the duty of the Interstate Commerce Commission to enforce. The court distinctly said the case did not arise under section 12 of the act to regulate commerce, which deals with the production of evidence before the courts or the Commission, and "does not make provision for inspection by examiners duly authorized by the Commission." As this is a case under section 12 for the production of evidence in a proceeding to enforce specific provisions of the act to regulate commerce, it is difficult to understand wherein the case cited is in point. If this is not a proceeding authorized by section 12, the Commission has no standing in court; and if it is such a proceeding there is not the slightest ground for the contention that the case cited has any application. In connection with that case counsel also comment at length upon the fact

that certain members of the Interstate Commerce Commission appeared before the Senate committee and pleaded for the retention of certain provisions in the so-called Railroad Securities Bill, which it is stated had been introduced in Congress at the instance of the Commission and which had passed the House. By these provisions it was proposed to give the Commission access at all times to all "accounts, records, memoranda, correspondence, documents, papers, and other writings" relating to "financial" transactions kept in the custody or under the control of any person or corporation having had any financial transactions with a common carrier. The powers thus sought had no relation whatever to the right conferred upon the Commission by section 12 to require the production in proceedings before the Commission of "books, papers, and documents," and it is inconceivable that the Commission thought that the provisions of the proposed bill would enlarge its power to require the production of "books, papers, and documents" in such proceedings.

VII.

The services furnished by car lines are furnished by them either as agents for the carriers or as agents for the shippers, and the Commission may investigate the charges for and the practices relating to such services as if such services were furnished directly by the carriers or the shippers.

The act makes it the duty of a common carrier to furnish everything that is defined as transportation. The shipper may relieve the carrier of that duty by

performing some part of the service himself with the consent of the carrier, but if he does so the allowance made to him for that service must be a reasonable one. Every transportation service must, therefore, be regarded as performed either for the carrier or the shipper. If the service is performed for the carrier by an agent or subcontractor, the Commission has the same authority to inquire into the cost of the service that it would have if the service were performed directly by the carrier. Any person who performs a service which it is the duty of the carrier to perform voluntarily submits himself to the jurisdiction of the Commission to the extent that such jurisdiction is necessary to enable the Commission to ascertain what would be a reasonable charge for the service. If the service is performed for the shipper, the Commission has the power to inquire into the cost of the service in order to determine whether or not the allowance made to the shipper is a reasonable one. Whether the car line performs the service for the railroad or the shipper it is a party affected by "the rate, regulation, or practice under consideration" within the meaning of section 2 of the Elkins Act, when such "rate, regulation or practice" is under investigation by the Commission for the purpose of determining whether or not the law has been violated and the Commission may make orders against the car lines to the same extent as it is authorized to do with respect to carriers, provided the car line has been made a party to the proceeding.

Section 1 of the Elkins Act, after prohibiting any device by which any advantage or discrimination is given, provides:

> In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person.

As the Armour Car Lines furnishes a transportation service which it is the duty of the carrier to furnish, that company must be regarded as performing the service for the carrier within the meaning of this section. The court will not resort to any refined distinctions for the purpose of relieving incorporated car companies from the obligation to give information which it is important for the Commission to have for the purpose of determining whether or not they are violating the law or aiding and abetting either carriers or shippers in doing so.

GENERAL REVIEW OF CASES CITED BY APPELLANT.

Some of the cases cited in the brief for appellant have already been noticed. It is unnecessary separately to comment upon each of the other cases cited. To all of them there is one answer, and that is that they have no bearing on the right of the Commission to require a corporation to furnish information as to its relations with shippers or carriers, or as

to its own accounts, when that information is reasonably necessary to enable the Commission to determine whether or not such corporation or a carrier or shipper with whom it has contractual relations has violated the act to regulate commerce in respect to a matter which might have been made the object of a complaint, and as to which the Commission is conducting an investigation of its own motion for the purpose of making such orders as may be necessary to correct any violations of the act which may be found to exist.

CONCLUSION.

The entire argument for appellant is based upon the assumption of the existence or nonexistence of certain facts when the existence or nonexistence of those facts was the matter in issue before the Commission. Counsel assume that Armour Car Lines is not directly or indirectly interested in the shipments which Armour & Co. makes in its cars, and that the contracts between Armour Car Lines and Armour & Co. could not possibly operate to give Armour & Co. any advantage over any other shipper. They also assume that an inspection of the accounts of Armour Car Lines could not throw any light upon the relations existing between Armour Car Lines and Armour & Co. or between Armour Car Lines and the railroads. All these matters were in issue, and we think the questions asked the witness had a legitimate bearing upon the issues. To hold that the Commission has no right in an investigation in which witnesses may

be compelled to testify to inquire into the affairs of a corporation, which, it is alleged, is owned by a large shipper, and through which that shipper may obtain the equivalent of rebates, and which has no other business than that which relates to transportation, merely because it is not a common carrier and the testimony relates to its "private affairs," would go far towards defeating the purposes for which the Commission was created and would be in direct conflict with the many cases in which this court and other courts have held that the Commission should not be too narrowly constrained in the matter of procuring testimony in investigations for the purpose of ascertaining whether or not specific provisions of the Commerce act have been violated.

An affirmance is asked.

Respectfully submitted.

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